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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

JUNE—AUGUST, 1882.

ROBERT DESTY, EDITOR.

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UNITED STATES

CIRCUIT AND DISTRICT COURTS

WITH THE

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

STATE OF TEXAS *v.* LEWIS and others.

(*Circuit Court, N. D. Texas. April, 1882.*)

1. REMOVAL OF CAUSE—NOMINAL PARTIES.

A tenant in possession sued in trespass to try the title to land, and who disclaims title, may have her landlord, the real party in interest, substituted as defendant. In such case she is but a nominal party on the record, whose presence could not defeat the right of the real parties in interest to have the cause determined in the federal court.

Greene v. Klinger, 10 FED. REP. 689, followed.

2. SAME—ACTIONS BROUGHT BY STATE—ALIEN DEFENDANTS—RIGHT TO REMOVE.

Where, by act of congress, the power of the United States judiciary was extended to controversies between a state and the citizens thereof and subjects of a foreign state, the act is broad enough to cover a suit brought by the state against the subjects of friendly foreign powers, and such alien defendants, being the real parties in interest, have the right to have their cause removed for trial to the circuit court, and a motion to remand should be refused.

Motion by the Plaintiff to Remand to the State Court.

Clark & Dyer, C. A. Jennings, the Attorney General of Texas, and the County Attorney of McLennan county, for plaintiff.

C. S. West and Gen. Thos. Harrison, for defendants.

MCCORMICK, D. J. The record shows that in accordance with a joint resolution of the sixteenth legislature, passed the nineteenth of February, 1879, directing a suit to be brought for the purpose of

settling the title of the state, and of those who held title under the state, as purchasers of certain of the university lands, this suit was brought, in the name of the state, in the district court of McLennan county, against Jenny Lewis, a citizen of Texas. She answered, disclaiming all title or interest, in her own right, in the subject-matter in controversy, alleging that she was only on the land in her capacity as tenant of her landlords, Gregorio Jose Martinez Del Rio and Pabla Jose Martinez Del Rio, and prays that they may be permitted to appear as defendants. At the same time the Del Rios, alleging themselves to be residents of the republic of Mexico and subjects of Great Britain, appear, and, making themselves parties defendant and answering said suit, proceed in due time, by proper steps, to remove the cause to this court, and file in due time in this court the transcript of the proceedings had in the state court.

The grounds relied on in argument in support of the motion to remand may be resolved into two :

(1) Because the defendant Jenny Lewis is a citizen of Texas, and a necessary party to the suit. (2) Because this court has no jurisdiction of a case wherein a sovereign state of this Union is the plaintiff, even though the defendants are aliens, and the case is attempted to be brought here by removal from the state court.

The Texas statute, in reference to the action of trespass to try title, provides in article 4789, Rev. St. :

" When such actions shall be commenced against a tenant in possession the landlord may enter himself as the defendant, or he may be made a party on the motion of such tenant, and he shall be entitled to make the same defence as if the suit had been originally commenced against him."

The defendant Jenny Lewis, upon her landlords becoming defendants, fully disclaimed all interest and any title in the land in suit, and asks the judgment of the court. Whether, for certain purposes of the action, the plaintiff had the right to have this disclaiming defendant, who was the actual occupier of the premises, retained as a defendant, it seems clear to my mind that within the meaning of the acts of congress on the subject of removal of causes from the state courts, Jenny Lewis was a mere nominal party, whose presence as a defendant on the record could not defeat the right of the real defendants to the controversy to have the same heard and determined by this court. This, I think, is clearly embraced in the actions and opinions of Judges Duval, Wood, and Pardee, in the cases 1,811, 1,812, and 1,813. *Greene v. Klingler*, in the circuit court for western district of Texas, at Austin, 10 FED. REP. 689.

The other ground presents more difficulty, and involves questions which, while they may have been the subject more or less of judicial discussion, have not been directly involved in any decision of the supreme court, and as here presented have not, as I conceive, been ruled upon by any of the circuit court decisions to which I have had access. I have not been able to examine the case of *Gale v. Babcock*, 4 Wash. C. C. 344, not being furnished or able to obtain the report of the case, but from references to it in other opinions it was not a suit against an alien. The cases cited by plaintiff's counsel from 4 Dallas, 12; 2 Pet. 136; 5 Cranch, 303; 2 Blatchf. 162; 3 Blatchf. 244, do not reach the question involved here.

In *Prentiss v. Brennan*, 2 Blatchf. 164, Judge Nelson carefully limits his language to "individual parties," a limitation which it is plain to my mind must be implied in each of the other cases cited.

State v. Brailsford, 2 Dallas, 402, shows that Judge Iredell, on the circuit, refused to let the state intervene, holding, as shown in his opinion, that "whenever a state is a party the supreme court has exclusive jurisdiction of the suit." Mr. Justice Wilson expresses a different view, and the other judges announce no opinion on that question.

In *State v. Trustees of University*, 5 N. B. R. 466, Judge Brooks refused to entertain a suit by the state against its own citizens, taking exception on his own motion to the jurisdiction, without the suggestion of counsel or benefit of argument thereon, and his view, strongly expressed, is that where the jurisdiction depends upon the character of the parties and not the character of the subject in controversy, any attempt upon the part of congress to vest jurisdiction of causes in which a state is a party in the circuit court would be ineffectual.

In *Wisconsin v. Duluth*, 2 Dill. 406, Mr. Justice Miller dismissed the plaintiff's bill, (*Dillon*, C. J., concurring,) holding expressly that a state cannot bring an action or suit in the circuit court of the United States against a citizen or citizens of another state. His opinion in that case shows that it was carefully considered, and, though he suggests the limited opportunity which the exigency of the case gave for investigation, the cast of the opinion clearly shows that he then had present before his mind the rulings and the reasonings of all the reported cases bearing upon the question. He alludes to the view that had been advanced, that the constitution having given the supreme court original jurisdiction, that court could not exercise, also, appellate jurisdiction, and that, therefore, if the circuit court could exercise jurisdiction in such cases, no appeal or writ

of error could be had when such suits were brought in the circuit court; and he says that the natural import of the language used in the constitution favors very strongly this idea. He, however, waives this view of the question, and proceeds to show that the constitution extends the judiciary power of the federal government to such cases (a state against citizens of another state) and gives the supreme court original jurisdiction, and does not, *proprio vigore*, confer jurisdiction of such cases on any other court; that all other courts of the United States, being creatures of the statute, can exercise no jurisdiction but such as is given by the statute; that if congress can confer on the circuit courts original jurisdiction in this class of cases, it is a sufficient answer to say that it has not done it. And, in conclusion, he announces "that it is with the less reluctance we dismiss the bill, as we must for want of jurisdiction in this court, because we have no doubt that both the state courts of Minnesota and the supreme court of the United States are open to the state of Wisconsin for such relief as she may be entitled to."

Does it follow from the proposition that neither the constitution nor any act of congress authorizes a state to sue in the circuit court, that where a suit is properly brought, in a state court having unquestioned jurisdiction, by a state against an alien, the alien cannot, under section 639, Rev. St., remove the cause to the circuit court?

The language of this section is very broad: "Any suit commenced in any state court * * * may be removed * * * in the cases and in the manner stated in this section: *First*, when the suit is against an alien." This is certainly a suit brought in a state court. There can be no question as to the jurisdiction of the state court to enforce the rightful claims of the state against persons or real property within her bounds. This case now stands as though it had originally been brought against the alien defendants; but at the institution of the suit the only defendant then disclosed, and, for all that appears, the only adverse claimant then known to the plaintiff, was a citizen of Texas, of which parties only the state courts could entertain jurisdiction. It subsequently appeared (as Chief Justice Marshall announced might often occur) that the real parties to the controversy were such as brought the case within the judiciary power of the United States. A party clearly entitled to have his rights passed upon by the courts of the United States, finds himself sued in a state court in a controversy involving values of large amount. A statute of the United States, expressed in terms apparently broad enough to comprehend his case, directs the steps by which he can

remove the case to the circuit court. Those steps are taken; the case is docketed here in apparent accordance with that statute. Is this court without jurisdiction because jurisdiction has not been given by the act of congress?

The language of the act is surely broad enough to include this case, unless the true construction and import of section 2, art. 3, of the constitution withholds from the legislature the power to vest jurisdiction in the circuit courts, (dependent upon the character of the parties,) in cases "in which a state shall be a party." In my judgment this is not held by the case of *Wisconsin v. Duluth* or *Prentiss v. Brennan*; and the reasoning of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, and in *Osborn v. Bank of U. S.* 9 Wheat. 738, is certainly not inconsistent with the view that congress could vest such jurisdiction in the circuit courts. The language used by him in his opinions in those cases, and the language used by Mr. Justice McLean and Chief Justice Taney in the opinions they delivered in the case of *Pennsylvania v. Wheeling Bridge Co.* 13 How. 520, indicates that those eminent judges, and perhaps the whole court as then constituted, were of opinion that the giving the supreme court original jurisdiction, in cases "in which a state shall be party," did not so vest in that court exclusive jurisdiction in such cases as to withhold from congress the power to vest in the circuit court a concurrent jurisdiction in such cases.

It is conceded, being well settled by those cases and many subsequent ones, that cases where the subject-matter of the controversy would give the federal judiciary jurisdiction, may originate in other courts and be removed to the circuit court or taken by appeal or writ of error to the supreme court, although a state shall be party. And this was the phase of the question judicially pressing upon the mind of the judges in those early cases. They appear to consider the provision giving the supreme court original jurisdiction in cases in which a state shall be party, to have been adopted out of regard for the dignity of the party. At the time of the adoption of this provision of the constitution it had not been deemed necessary or expedient to exempt the states from being sued by citizens of another state, or by citizens or subjects of foreign states. Now, out of regard to the dignity of a state, she is exempt from being sued in the United States courts, and on account of her dignity she is permitted to bring an original suit in the supreme court of the United States, when she has a case to which the judiciary power of the United States extends. But when, disregarding or waiving this privilege, she voluntarily comes into

another court, must she not come as any other suitor, subject to all the conditions and provisions which would apply were one of her citizens the plaintiff instead of herself?

Here, as this suit now stands, the state of Texas has brought a suit in a state court, wherein the amount in dispute, exclusive of costs, greatly exceeds the sum of value of \$500, against alien defendants. It does not appear that the subject-matter of the suit falls within the judiciary power of the United States, hence there can be no removal by writ of error after trial to the supreme court. There is no statute providing for removal before trial of any suit from a state court to the supreme court of the United States. If congress can provide for the removal of such cases to the circuit court, the provision is ample. If congress cannot so provide, here is a case between a state and a subject of a foreign state, (to which the judiciary power, by express terms, extends,) wherein the subject of a foreign state cannot invoke the protecting ægis of the judiciary power of the United States. And if that power was extended to controversies between a state and the citizens thereof, and subjects of a foreign state, to give to the subjects of friendly foreign powers an assurance they might not be able otherwise to entertain, of receiving impartial justice in the judicial determination of any controversy which might be urged against them by one of our states or the citizens thereof, surely this case brings these defendants within the mischief intended to be guarded against. Here the state on her own behalf, and that, too, as actual trustee of a sacred fund, dedicated to a purpose which enlists the most noble pride and warmest affection of our whole people, and also on behalf of individual citizens, numerous, perhaps, and influential residents of McLennan county, where the suit is brought, who have purchased lands from the state involved in the same questions sought to be settled by this suit, brings this suit in her own courts against these alien defendants. In the absence of constitutional or statutory provisions reaching the case, its features, as I have grouped them, would address a constituent or legislative assembly rather than a court of justice. But courts of justice, in the discharge of their duty to declare the true import and construction of constitutional and statutory provisions, do derive abundant aid from the consideration of all the material features of the case actually made before them; and it is this which gives to judicial decisions a weight of authority not accorded to any merely speculative reasoning of the most eminent judges. From a careful consideration of the terms of the constitution, and of the acts of congress bearing on the questions, and a full

examination of all the authorities to which counsel have referred, I am constrained to hold that the defendants have the right to have this cause tried by this court, and that the motion to remand should be refused. And it is so ordered.

NOTE.

NOMINAL PARTIES. The non-joinder of nominal or unnecessary parties will not defeat the right to a removal.(a) They are not to be treated as parties, although made parties to the suit.(b) So, if a citizen of the state where suit is brought is not a necessary party, and his presence is not essential, the non-resident defendant may remove although the former does not unite in the petition;(c) and where all the defendants join but one, and that one is an unnecessary party, the cause may be removed.(d) So, if plaintiff is a citizen of another state he may remove the cause if some of the defendants, citizens of another state, are merely nominal parties.(e) The right to a removal is not affected by the fact that a defendant, a citizen of the same state, is a proper but not an indispensable party to a separable controversy.(f) Where the real party to a controversy is clearly entitled to have his rights passed upon by the courts of the United States, he is entitled to remove although the nominal party has no such right.(g) So, where a landlord, the real owner, assumes the defence, he makes himself a party, and being the real defendant may remove the cause if he be a citizen of a state other than that of the plaintiff.(h) So, in ejectment, the sole owner may remove, although his grantor, a citizen of the same state as plaintiff, is a party.(i) If the only relief prayed in a suit against a corporation and its officers is by injunction, the officers are merely nominal parties;(j) so of a suit to enjoin the execution of a lease.(k) They are not such necessary parties to a suit involving title to lands as to prevent a removal.(l) Officers joined as defendants in equity, but as to whom no relief is prayed, are nominal parties, such as will not defeat the right to a removal.(m) Where a non-resident stockholder of a banking corporation does not unite in the application, the corporation cannot be heard to complain; the objection can only be assigned as error by the party himself.(n) State and county officers are not necessary parties to a controversy relating to the validity of bonds.(o)—[Ed.

(a) Wood v. Davis, 18 How. 467; Ward v. Arredondo, 1 Paine, 410; Arapahoe Co. v. Kansas P. R. Co. 4 Dill. 277; Edgerton v. Gilpin, 3 Woods, 277; Fisk v. Chicago, R. I. & P. R. Co. 53 Barb. 472; Mayor, etc., v. Cummins, 47 Ga. 321; Calloway v. Ore Knob Co. 74 N. C. 200.

(b) Livingston v. Gibson, 4 Johns. Ch. 94; James v. Thurston, 6 R. I. 428.

(c) Hatch v. Chicago, R. I. & P. R. Co. 6 Blatchf. 106; Ex parte Girard, 3 Wall. Jr. 263; Hadley v. Dunlap, 10 Ohio St. 1; Livingston v. Gibbons, 4 Johns. Ch. 94, contra; Wilson v. Blodget, 4 McLean, 363.

(d) Cooke v. Seligman, 7 Fed. Rep. 263.

(e) Akerly v. Villas, 2 Biss. 110. See Sands v. Smith, 1 Dill. 290.

(f) Barney v. Latham, 2 Morr. Trans. 638.

(g) Cohens v. Virginia, 6 Wheat. 264.

(h) Greene v. Klinger, 10 Fed. Rep. 689.

(i) Calloway v. Ore Knob Co. 74 N. C. 200.

(j) Hatch v. Chicago, R. I. & P. R. Co. 6 Blatchf. 105.

(k) Pond v. Sibley, 7 Fed. Rep. 129; Nat. Bank of Lyndon v. Wells Riv. Manuf'g Co. 7 Fed. Rep. 750.

(l) Nat. Bank of Lyndon v. Wells Riv. Manuf'g Co. 7 Fed. Rep. 750; Pond v. Sibley, Id. 129.

(m) Fisk v. Chicago, R. I. & P. R. Co. 6 Blatchf. 105.

(n) Danville Bk. & T. Co. v. Parks, 88 Ill. 170.

(o) Town of Aroma v. Auditor, 2 Fed. Rep. 33.

FOUNTAIN *v.* TOWN OF ANGELICA.

(Circuit Court, N. D. New York. April, 1882)

1. REMOVAL OF CAUSES—ASSIGNEES AS PARTIES.

A plaintiff who has been introduced into a controversy by assignment or transfer merely that he may acquire a standing and relation to the controversy to enable him to prosecute it for the beneficial interests of the original party, is improperly and collusively made a party to the suit.

2. SAME—COLLUSIVE ASSIGNMENT.

Where the plaintiff has no substantial interest in the coupons sued on, but obtained the legal title to enable him to maintain the action, and where he bought them without any inquiry as to their validity or value, and pretended to pay for them by a check which he never paid, it is the duty of the court to dismiss the suit.

Spencer Clinton, for plaintiff.

Hamilton Ward, for defendant.

WALLACE, C. J. By the fifth section of the act of March 3, 1875, to determine the jurisdiction of circuit courts of the United States, it is declared that if at any time in the progress of a case, either originally commenced in a circuit court or removed there from a state court, it shall appear that such suit does not really involve a dispute or controversy properly within the jurisdiction of the court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act, the said circuit court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed.

This action presents the question whether the plaintiff has been improperly or collusively made a party for the purpose of creating a case cognizable by this court within the meaning of the section referred to.

It is said by the supreme court in *Hawes v. Contra Costa Water Co.* 25 Alb. Law J. 146, [S. C. 11 FED. REP. 93, note,] that this statute strikes a blow at improper and collusive attempts to impose upon this court cognizance of cases not justly belonging to it. Before this act was passed it was settled law that although a transfer of the subject of the controversy may have been made for the purpose of vesting an interest in parties competent, by reason of their domicile, to litigate in the federal courts, that circumstance would not defeat the jurisdiction if the transaction invested the assignee with the real interest in the subject-matter; yet, if the assignment

was colorable only, and the real interest still remained in the assignor, jurisdiction would not be entertained. *Barney v. Baltimore City*, 6 Wall. 280. The section in question, therefore, was quite unnecessary if it was only intended to reach a case in which the plaintiff, by assignment, obtained merely a colorable title to the subject of the controversy. It is not difficult to discern the purpose of the section. It had long been notorious that the jurisdiction of the circuit courts was constantly invoked for the benefit of parties not within the class which the constitutional grant of jurisdiction to the federal courts was intended to include; by parties who, because they were citizens of the same state as their adversary, could only resort to the courts of the state, but who, for some ulterior motive, desired to resort to the federal courts. The convenient device was resorted to of transferring the subject of the controversy to a citizen of another state, a friendly coadjutor, who, while acquiring the legal title, was expected to litigate for the benefit of the original party. Thus, new parties were introduced into controversies in which they had no substantial interest, merely to bring cases into the federal jurisdiction. It cannot be doubted that the provision in question was intended to meet and prohibit a jurisdiction sought and obtained by such collusive methods. It should be held that a plaintiff who has been introduced into a controversy by an assignment or transfer merely that he may acquire a standing and relation to the controversy which will enable him to prosecute it for the beneficial interests of the original party, "has been improperly and collusively made a party for the purpose of creating a case cognizable under the act."

No better illustration of the class of cases which the section was intended to meet could be presented than the present case affords. It is palpable upon the evidence that the plaintiff has no substantial interest in the coupons which are sued upon, conceding that he acquired the legal title to them so as to enable him to maintain the action. He bought them at the solicitation of one Dick, without any inquiry as to their validity or value, and without any negotiation concerning the price to be paid. He pretended to pay for them by a check which he has never paid, which was made for the full face amount of the dishonored and contested coupons, which was paid, if paid at all, by a bank of which Dick was a director and the plaintiff was an assistant cashier; and which, after the expiration of three years, he has never heard of since he gave it. He testifies he had no personal interest in the transaction. He was informed the coupons would have to be collected by suit. He placed them in the hands of

Dick's attorney, for collection, very soon after receiving them. He testifies that he did not expect to be responsible to the attorney for his charges. In short, he was merely an instrument of Dick, selected by Dick, and invested with a formal title to the coupons, in order that Dick might litigate them in a federal court.

It is the duty of the court to dismiss the suit.

NOTE. A *bona fide* conveyance of property in controversy for the express purpose of conferring jurisdiction, is no ground for remanding a cause to the state court, (*Hoyt v. Wright*, 4 FED. REP. 168;) but a defendant cannot acquire the right to a removal by the purchase of the interests of his co-defendants. *Temple v. Smith*, 4 FED. REP. 392. Where a citizen transfers mortgage notes to a foreigner for the purpose of giving jurisdiction, not accompanied with an agreement for a retransfer, the circuit court will take jurisdiction of the cause when removed. *Marion v. Ellis*, 10 FED. REP. 410. So the right to sue is not invalidated by the fact that the note was transferred for the purpose of giving the court jurisdiction; (*Lanning v. Lockett*, 10 FED. REP. 451; affirmed, S. C. 11 FED. REP. 814;) but the transfer of a deed *mala fide* in one state to the citizen of another will not enable the grantee to maintain ejectment in such court. *Greenwalt v. Tucker*, 10 FED. REP. 384. The circuit court has no jurisdiction of a cause on the ground of citizenship, where the nominal parties are not the real parties in interest, but have been made parties collusively, to bring the controversy within the jurisdiction. *Marion v. Ellis*, 9 FED. REP. 367. Where parties conveyed lands to a stranger, a citizen of another state, without his knowledge and without consideration, for the purpose of creating jurisdiction in the United States courts, the transaction was only colorable and collusive, and the suit must be dismissed. *Coffin v. Haggin*, 11 FED. REP. 219.—[ED.]

LOGAN v. GREENLAW and others.

(Circuit Court, W. D. Tennessee. May 20, 1882.)

1. EQUITY—PLEADING—FORMER SUIT PENDING—ABATEMENT—STATE AND FEDERAL COURTS.

The pendency of a bill in equity for the same subject-matter, and between the same parties, in a state court, is no bar to a similar bill in the federal court in the same state.

2. SAME—PARTNERSHIP BILL—ADMINISTRATION BILL.

Where a partner filed a bill in the state court to settle the partnership against the representatives of his deceased partner, and subsequently a creditor filed a bill under the Tennessee Code, in the same court, against the representatives of the deceased partner, to sell land to pay debts, and in each of these proceedings a non-resident creditor of the partnership filed a petition to have her debt paid, *held*, that a plea of former suit pending, setting up those proceedings, in defence of a bill to settle the partnership, filed in the state court by the non-resident creditor, and by her removed to the federal court, was insufficient.

3. STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION—POSSESSION OF PROPERTY.

Whenever a court, by mesne or final process, or without any process, has in its possession property which it is proceeding to dispose of according to its practice, another court, except one of superior supervisory jurisdiction, will not by its process, or otherwise, undertake to dispossess the first court or its officers. But this doctrine does not apply to oust the jurisdiction of all other courts to determine the same controversy, so far as they may rightfully do so, but only to protect the immediate possession of the first court and its officers from disturbance. And whenever the litigation is ended, or the possession of the court or officer discharged, other courts are at liberty to proceed according to the rights of the parties, whether these rights require them to take possession of the property or not. *Held, therefore*, that a partnership creditor may proceed with a bill to settle the partnership and subject partnership assets, although there may be at the same time a bill between the partners pending in a court of concurrent jurisdiction in another forum wherein the property is in the hands of a receiver, so long as it does not interfere with the possession of the receiver.

In Equity.

The bill which was originally filed in the state court alleges:

That the plaintiff is a citizen of Mississippi and the defendants are citizens of Tennessee, and that the plaintiff is a creditor, by judgment of the supreme court of Tennessee, of the firm of W. B. Greenlaw & Co. for the sum of \$3,357.34, and costs; that the firm was composed of W. B. Greenlaw and J. O. Greenlaw, both now deceased; that, pending plaintiff's suit against them, J. O. Greenlaw died, and the surviving partner filed a bill to settle the partnership against the representatives of the deceased partner, who had left a will; that that bill prayed for a general settlement between the brothers, but particularly the partnership, to ascertain and pay its debts by a sale of sufficient of the partnership property for the purpose, and for a division of any surplus; that defendants appeared, and, after certain proceedings had, commissioners were appointed to divide the property, mostly real estate, and made a report dividing part of the property, which report was confirmed; that as to another part they reported that partition could not be made without great sacrifice to parties interested, and recommended that it be held in common "till the termination of the litigation then pending in regard thereto;" that the court decreed that that portion "be held by W. B. Greenlaw as tenant in common with the widow and heirs of J. O. Greenlaw, deceased, with full power and authority to collect rents, pay taxes, and insure and manage said property, subject to the further order of this court;" that by sundry orders of the court the case was referred to a special commissioner to take proof and report "the debts due and owing by the said firm, and its remaining assets;" that on November 28, 1879, he reported the claims set out in the bill, including that of the plaintiff in this case, she having, during the pendency of that suit, obtained her judgment, as mentioned in this bill, which report was confirmed; that pending the proceedings on that bill W. B. Greenlaw, who was the executor of J. O. Greenlaw, died, and the commissioner reported "that J. O. Greenlaw's representatives claim that, in view of the insolvency of W. B. Greenlaw's estate,

which has been suggested in proceedings in this court, the firm property is first liable for any of these claims that may be eventually established against it, and that any alienation by W. B. Greenlaw of his interest, by either deed, mortgage, or deed of trust, or otherwise, cannot operate to relieve it of this charge;" that the commissioner reported that the only assets of the firm remaining undisposed of were certain parcels of real estate, six in number, situated in the city of Memphis, all described in the report and the bill in this case, a body of land in Arkansas, and certain claims against the city of Memphis, one Walt and J. R. Williams' estate, also described; that on the confirmation of this report on February 19, 1880, it was among other things decreed "that the claims aforesaid against Williams and Walt be vested in D. H. Poston, administrator *de bonis non* of J. O. Greenlaw, with right to use names of the heirs and executor of W. B. Greenlaw in collection of the same;" and that "the balance of the personal and real assets of the firm of W. B. Greenlaw & Co., and particularly the real estate set out in the report herein, be held subject to the further orders of this court for the purposes of the partnership, the payment of its indebtedness, and the equalization of the partners."

The bill also alleges that the parties to the suit of *Greenlaw v. Greenlaw*, being representatives respectively of J. O. Greenlaw and W. B. Greenlaw, "neglect and refuse to make, or cause to be made, a sale of the said firm property so reserved as aforesaid, or its application to the payment of the firm debts. They also resist and oppose any application by the creditors of the said firm to be allowed to intervene in the said cause and to procure a sale of said property." It also alleges that the property is depreciating in value, and the taxes are allowed to accumulate and remain unpaid; that the property, or some of it, is in possession of the People's Insurance Company, which claims it by some title from W. B. Greenlaw. This company is made defendant to this bill, and its title disputed as against the plaintiff's right. All the personal representatives and heirs or devisees of the Greenlaws, and all the creditors mentioned in the commissioner's report, are made defendants. The bill prays:

"That on final hearing a decree may be made directing the sale of all the said partnership property for the payment of the partnership debts, and particularly the debt due the plaintiff aforesaid, and that such sale be so made as to bar the equity of redemption; that proper references be made, and the proper accounts taken and stated; that a receiver may be at once appointed and directed to take possession of and control the said property, collect the rents, pay the taxes, keep it in repair, and do whatever else may be required of him; that the title or claim of the People's Insurance Company be decreed subordinate and subject to the liens and claim of the plaintiff and the other partnership creditors; and that the plaintiff may have all other just, proper, and necessary relief."

A guardian *ad litem* was appointed for the minor defendants in the state court, and he and the heirs and the administrator *de bonis non* of J. O. Greenlaw, deceased, demurred to the bill, and their demurrer was overruled by the chancellor. W. E. Greenlaw, executor of W. B. Greenlaw, deceased, filed a plea setting up that there was pending in the same court an insolvent bill against him to settle the estate of his testator according to the laws for the settlement of insolvent estates, and also the statute of limitations in favor of dead men's estates. D. H. Poston, administrator *de bonis non* of J. O. Greenlaw, the heirs, and the guardian *ad litem*, filed a plea of a former suit depending, alleging that the plaintiff exhibited her petition in the chancery suit in that court in the case of *R. C. Brinkley v. D. H. Poston, Adm'r, etc.*, a creditor's bill seeking the same relief as the bill in this case seeks, asking to be made a party thereto, and to have the same relief the plaintiff was seeking as to his debt, and the same she now seeks by this bill; which proceeding was still pending. The People's Insurance Company filed a demurrer, which was overruled by the chancellor. When the cause was in this condition the plaintiff filed her petition and bond (November 25, 1881) to remove it to this court, and a motion to remand for want of jurisdiction was refused.

The representatives of J. O. Greenlaw thereupon, by leave, filed amended and additional pleas as follows:

(1) The plea before mentioned of former suit pending is amended by alleging that the suit of *Brinkley v. Poston, Adm'r*, was filed "under the act of 1827 for the subjection of the real estate of solvent estates of deceased persons," and was subsequently further amended "so as to embrace the administration of the partnership assets of W. B. Greenlaw & Co., and especially the property mentioned in this proceeding," and that before this suit was brought the defendants, as the representatives of J. O. Greenlaw, deceased, "had answered and made defence thereto." (2) An additional plea sets up the pendency of the suit of *Greenlaw v. Greenlaw*, mentioned in the bill, and avers that the decree confirming the commissioners' report declared that "the real estate set out in the report be held subject to the further orders of the court for the purposes of the partnership, the payment of its indebtedness, and the equalization of the partners," that on a certain day the plaintiff here filed her petition "of intervention," asking "that said property be subjected to her said alleged demand," and that said petition has never been dismissed or "struck from the files," but is still pending, and defendants plead said proceeding in bar of the present bill. (3) Another additional plea is precisely like the foregoing, except that it contains the averment that "said property is, and was at the filing of this bill, in the hands of a receiver in said cause, which said receiver was by the court appointed, and is in charge of the rents

and profits thereof under orders of the court." (4) The remaining additional plea is substantially the same as the first one, setting up the chancery cause of *Brinkley v. Poston, Adm'r*, as a former suit pending and a bar to this bill, except that it avers that the plaintiff here filed her petition in that cause asking the same relief she asks by this bill, which was and is still pending "as a matter of litigation in that suit," the same being "a creditors' bill, filed and defended under the act of 1827," and that the property is there *in custodia legis*.

These pleas have been set down and argued for insufficiency as not showing a defence to the bill.

William M. Randolph, for plaintiff.

Finlay & Peters and *T. B. Turley*, for defendants.

HAMMOND, D. J. These pleas are argumentative, and aver conclusions of law rather than facts, so that it has seemed to me better to refer the case to a master, according to the ordinary practice, to report whether the suits pleaded in bar are for the same cause of action. 1 Daniell, Ch. Pr. (5th Ed.) 637. But other business has already delayed this judgment so long that I have concluded to dispose of the pleas without a reference. And, disregarding any defective averments, but treating the allegations for all that, by intendment, they can be held to present to the court, it appears that the defence is narrowed to the simple question whether or not the chancery court has such jurisdiction of the subject-matter of this suit that we should not proceed here either by reason of a total want of jurisdiction or of comity between the courts.

Ordinarily the pendency of another suit between the same parties, in an independent jurisdiction, is no bar, or rather does not work an abatement. 1 Daniell, Ch. Pr. (5th Ed.) 633, and notes; *Ins. Co. v. Brune*, 96 U. S. 588. The suitor can have only one satisfaction, but may pursue as many different remedies in different jurisdictions as he can find applicable to his case. This is the rule of the Tennessee courts. *Lockwood v. Nye*, 2 Swan, 515. In *Stanton v. Embrey*, 93 U. S. 548, the principle was confirmed by the supreme court of the United States, and many of the authorities are collected by Mr. Justice Clifford; and Chief Justice Waite, in *Parsons v. Railroad Co.* 1 Hughes, 279, applies it to a general creditors' bill in the federal court of South Carolina, where a similar suit was pending in the state court of that state. No attempt was there made to reach the property of the company, but only to claim judgment, the court saying: "It will be time enough to consider how to reach any portion of the property involved in the litigation pending in the state court for

the purpose of subjecting it to the payment of his judgment when he attempts to do so." The rule seems to be the same as between the courts of the several dominions in the united kingdom of Great Britain. *Phosphate Co. v. Molleson*, 1 App. Cas. 780.

There is also another rule that seems applicable to this case, particularly in view of the allegation of this bill that defendants resist any attempt of the plaintiff here to control or interfere with the management of the suits pleaded in abatement here, which is that there will be no stay of proceedings where the second suit is brought by a different plaintiff from the first, unless the plea avers that the first suit has proceeded to a decree, because "*non constat* that a decree will ever be obtained." *Moore v. Holt*, 3 Tenn. Ch. 141, 143, and cases there cited; *Macey v. Childress*, 2 Tenn. Ch. 23; *Ins. Co. v. Brune*, *supra*, where Mr. Justice Strong says that a final decree in favor of the same party might be pleaded in bar, and the plea of a former suit pending in the same jurisdiction is an abatement only because the second suit is vexatious. The authorities will show, I think, that even in the same forum it is a mere matter of discretion whether the second suit shall abate or be staid, and that where a stay is allowed it will be generally with leave to the plaintiff to apply to go on with the second suit if the first is obstructed or does not proceed in the regular course. 1 Daniell, Ch. Pr. 633. If, therefore, the bill contains an averment that it is filed because the plaintiff is not allowed to interfere with the other plaintiff's right to control the litigation, or to share in that control, it would seem that such an averment should be denied to invoke the discretion of the court to stay the second suit. It is laid down by Mr. Daniell that where a bill is filed by one creditor in behalf of himself and all other creditors, and another creditor comes in and makes himself a party, he becomes a *quasi* plaintiff, and the plea is good as against another bill by him, his remedy being, if the first plaintiff is dilatory, to apply for liberty to conduct the cause himself. 1 Daniell, Ch. Pr. 635, and cases cited.

There seems also to be a distinction between cases where the creditor, coming in as a *quasi* party before or after a decree for an account in the first suit, files a second bill. In cases where he cannot come in until after a decree for the account he is not precluded from a second bill unless there has been a decree to which he may become a party; in the other cases he is so precluded. *Id.* What the effect of the statutory practice of the state courts may be on these rules it is not necessary now to inquire. Where the bills are filed in the same court (as this was) it is doubtless within the province of the

chancellor to control the whole subject by ordering a consolidation, or that the second suit be treated as a petition in the first, as he no doubt would have done if the cause had remained in his court. But here, in another jurisdiction, we must treat the subject as if the bill had been originally filed here, and, as I have shown, such a plea is not applicable unless it be a plea in bar setting up, not another suit pending, but a former recovery, in which plea a necessary averment is that the first suit has proceeded to a decree; and it seems to me plain that this plaintiff has not recovered such a decree in the chancery court, either as an actual or *quasi* party, as would amount to a former recovery for the same relief she now seeks. In the case of *Greenlaw v. Greenlaw* neither she nor any creditor was made a party, as they all should have been had the bill been filed in the interest and for the benefit of the creditors; but it was a suit between the partners *inter sese* and for their interest, that of the creditors being only secondary, and brought into it merely because it was necessary in order to adjust the partnership matters. If any creditor had been in control of the suit it is probable the decrees would have been of a different character. The supreme court of Tennessee, in the case of *Moffatt v. Wells*, MSS. Jackson, April, 1882, has recently decided that a bill by one partner against another to settle the partnership, even where it was insolvent, did not impound the property or make it a trust fund, nor preclude creditors from proceeding in the same or another court by attachment to secure their debts.

It is true, in this case there was a reference to a master to ascertain and report the debts, and according to the bill plaintiff proved her debt before him, and he reported it; and according to the pleas here she filed her "petition of intervention," which I suppose means a petition to become a party, either plaintiff or defendant, the plea does not say which, asking to have the property subjected to her debt. The plea only avers that her petition has never been dismissed. It does not aver that it has ever been granted, and she made a party by the necessary order; and in the bill it is averred that the defendants have denied her admission to control as a party. It is plain, therefore, that she is not a party to that suit, in the sense that the law requires, to make the plea of former suit pending available.

We come now to the other suit of *Brinkley v. Poston, Adm'r.*, which is alleged in the pleas to have been filed under the Tennessee act of 1827, (T. & S. Code, § 2267 *et seq.*) This act allows an executor, administrator, or any creditor, where the personal assets of a deceased person have been exhausted in the payment of debts, to file a

bill in equity to subject the lands descended to the heirs or devised by the will to such payment. It is very clear that such a bill is not for the same purpose as that filed in this case. It may be that a creditor of J. O. Greenlaw, in his capacity as a member of the firm of W. B. Greenlaw & Co., might there prove his debt, and seek satisfaction out of his estate; but it is not like a bill by that or another creditor against the partners, or their representatives, to subject the partnership assets. But the plea avers that the bill was subsequently amended "so as to embrace the administration of the partnership assets of W. B. Greenlaw & Co., and especially the property mentioned in this proceeding." It appears from the bill (and by the other pleas, if they can be looked to in this connection) that these partnership assets were in the hands of W. B. Greenlaw, surviving partner, where they properly belonged, and not in the hands of J. O. Greenlaw's representatives or heirs, and that the surviving partner had long before filed a bill (the case of *Greenlaw v. Greenlaw, supra*) to settle the partnership, and it is difficult to perceive how the amendment could be pertinent to the original bill. But if the title had descended to J. O. Greenlaw's heirs, so that it was a proper amendment, it was only for an incidental purpose, the main object of the bill being to sell J. O. Greenlaw's real estate to pay his debts, and not a bill to settle the partnership in the sense of the rules of law governing this defence of a former suit pending. The authorities already cited show abundantly that it must be a suit between the same parties and for the same purpose. If the first suit has any other purpose with which this plaintiff, in her capacity as a *partnership* creditor, has nothing to do, she cannot be embarrassed in her pursuit of *partnership* assets against *both* partners by litigation between the individual creditors of one partner and the representatives of that partner.

The fundamental requirement of a plea of former suit pending is wanting—the object of the two suits is not the same. *Watson v. Jones*, 13 Wall. 697, 717. Here she is suing, as she may, both partners, and seeking to establish her claim to have a court of equity subject partnership assets in the hands of the surviving partner or *his* representatives, presumably, to her debt and those of other partnership creditors. There she is suing, as she may, one of the partners or his representatives, and seeking to subject his individual assets, or such of the partnership assets as he or they may have possessed themselves of, to her debt; but the suits are by no means the same. The same process of a partnership account and settlement may be

necessary in both, or to ascertain her right in either; but the purpose of the two suits is not the same in any other sense than that the plaintiff's object in both is to have her debt paid. Hence, if she had herself filed that bill, the plea could not, in my judgment, be sustained. This plea, like the other, does not allege that she has been made a party to that suit by an order admitting her as plaintiff or defendant, but only that she filed her petition asking the same relief there as here, and that it is still pending as a matter of litigation in that suit. But this does not make her a party, and she cannot become such without the consent of the court and by an order for the purpose. If the parties defending against her claim had been anxious to pay these partnership debts, she would have been made a party, and not left to come in by petition as a *quasi* party. The creditor who files a bill occupies a better attitude than one left to struggle with hostile parties, who ignore his claim and only offer him such place in the suit as he can acquire by a petition. The right to come in by petition and the offer to do so do not make the case of a former suit pending. If I were sitting as chancellor in the state court, while I might exercise the power to consolidate the causes or hear them together, I would not entertain these pleas as technical pleas of a former suit pending, and remit the plaintiff to such relief as she could obtain by petition in either of the suits here pleaded in abatement. She cannot get, by such procedure, that plenary relief afforded by a bill like this, and that fact alone defeats the plea. But in an independent forum there can be no doubt that the pendency of such suits is not a defence.

The next consideration, so much urged in argument, is that mere comity forbids our entertaining this suit; that the state court being one of concurrent jurisdiction, and having first obtained the cause, should not be interfered with by this court. This assumes that we must necessarily interfere with that court to grant the relief prayed for here, and is based on the idea that the property is *in custodia legis*, and as the pleas aver, of the chancery court. Comity does indeed forbid any unseemly conflict between the courts for possession of the *res* involved, but does not prevent a pursuit of the same right in both courts where such conflict does not arise. The authorities already cited show that the mere pendency of a suit for the same relief in two courts does not create a conflict. In the language of the chief justice, already quoted, it will be time enough to determine how far we may go without disturbing the possession, real or imaginary, of the property alleged to be held by the chancery court, when the application is

made. It does not now appear that any conflict will necessarily arise. The plea alleges that a receiver has been appointed, but not with sufficient definiteness to enable us to say whether this allegation is based on a construction of the decree quoted by both the bill and the plea, that W. B. Greenlaw's representatives hold as a receiver, or on the fact that some other person has been placed in possession as a receiver in the ordinary way. But, taking the latter to be true, I do not understand that such possession would create a conflict unless we should be asked here to displace him; and we need not do that to give the plaintiff the relief she asks. The property might be sold, and the purchaser vested with the title and sent to the chancery court to obtain possession, as against the receiver of that court, if he were entitled to it; or it may be that we could go no further than to declare and settle the rights of the plaintiff, and stay execution of the decree until the chancery court had exhausted its jurisdiction over the property and released it. *Black v. Scott*, 9 Fed. Rep. 186, and cases there cited.

The argument of the defendants results in this; that a creditors' bill in the state chancery court, to settle an estate, draws to it jurisdiction of all controversies whatever pertaining to it, and that such jurisdiction is exclusive. This may be, so far as the right to proceed in any other state court is concerned; but it has been settled that the statutory injunctions, even in insolvency proceedings, cannot prevent a non-resident from resorting to this court. *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank v. Jolly*, 18 How. 503; *Hyde v. Stone*, 20 How. 170; *Payne v. Hook*, 7 Wall. 430; *Green v. Creighton*, 23 How. 90, 106; *Railway Co. v. Whitten*, 13 Wall. 270; *Harrison v. Wheeler*, 11 Fed. Rep. 206; *Pulliam v. Pulliam*, 10 Fed. Rep. 29; and see, also, *Buenos Ayres R. Co. v. Northern R. Co.* Law Rep. 2 Q. B. D. 210.

The defendants cite *Taylor v. Carryl*, 20 How. 583; *Taylor v. Taintor*, 16 Wall. 370; *New Orleans v. Steam-ship Co.* 20 Wall. 387, 392; *French v. Hay*, 22 Wall. 253; *Hagan v. Lucas*, 10 Pet. 400; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 341; *Memphis v. Dean*, 8 Wall. 64; *Hubbard v. Bellew*, 3 Fed. Rep. 447, 450; *Buck v. Ins. Co.* 4 Fed. Rep. 849. See, also, *Heyman v. Covil*, 20 Am. Law Reg. 171, and note, where the cases are collected and discussed.

I do not understand that these cases conflict with those I have cited in support of this judgment. Of course, there are some general expressions, such as "the court first acquiring possession of the orig-

inal case was entitled to hold it exclusively until the case was finally disposed of," that, taken literally in their broad language, would establish the principle contended for here, and thereby give the court in which a suit was brought exclusive jurisdiction in all cases and everywhere, without any limitation or qualification whatever; and on such a doctrine a plea of former suit pending should prevail in every conceivable case, which we have seen is not the law. What these cases establish is this: Wherever a court, by mesne or final process, or without any process, even, has in its possession property which it is proceeding to dispose of according to its practice, another court, except one of superior jurisdiction, will not by its process or otherwise undertake to dispossess the first court or its officers. And the principle will, in some circumstances, extend to protect the title of a purchaser from that court as against a purchaser from any other court. It is not necessary here and now to consider how far this principle extends. It is sufficient to say that the doctrine does not apply to oust the jurisdiction of all other courts, as we have abundantly shown, but only to protect the immediate possession of the court and its officers from disturbance. Whenever the litigation is ended, or the possession of the court or officer is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether these rights require them to take possession of the property or not. 20 Am. Law Reg. (N. S.) 179. Meantime, so far as it can, without disturbing the possession of the first court, the second will proceed to exercise its jurisdiction, and, if it can proceed without possession of the property, need not concern itself about the possession in the other court.

Of the class of cases to which this belongs Mr. Justice Campbell says:

"What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the state laws, (if any,) independently of the administration in the probate courts, cannot be considered until a case should be presented to this court." *Green v. Creighton, supra.*

A similar claim of exclusive jurisdiction was sought to be established for our late courts of bankruptcy on similar grounds, of having possession of all controversies and assets in the administration of insolvent estates, but it did not prevail, and the state courts universally refused to recognize the unwarrantable claim.

It is assumed in argument that under our act of 1827, before referred to, the chancery court has the property *in custodia legis*, and I

have, for the present purposes of this cause, so treated it; but I do not at all assent to that theory, though I need not decide it, and only refer to it to reserve the point. Courts get possession of property by a seizure of it, or by voluntary surrender to its officers, and possibly not otherwise. Transfers of property may not be effectual, or may be prevented by injunction, and thus it may be in one sense *in custodia legis*; but the possession of the party may not be the possession of the court in the sense of the rule we have been considering.

The pleas are insufficient.

DUMONT and others v. FRY and others.

(Circuit Court, S. D. New York. May 11, 1882.)

1. EQUITY—JURISDICTION—REMEDY AT LAW.

In a suit in equity, the objection that there is an adequate remedy at law raises a jurisdictional question, and which will be enforced by the court *sua sponte*, although not raised by the pleadings nor suggested by counsel; and even where the bill is framed so as to avoid the point, where it is apparent on the face of the bill that the remedy is at law, it is the duty of the court to decline jurisdiction and dismiss the bill.

2. SAME—RELIEF, WHEN NOT OBTAINABLE.

Where the case made by the bill resolves itself into a controversy between complainants and defendant as to defendant's right to withhold from complainants certain city bonds, to which complainants have the legal title, and defendant no title whatever, it is not a controversy of equitable cognizance, but for an action at law for conversion, or in replevin, which affords a plain and appropriate remedy.

3. SAME—PARTIES—REPRESENTATIVE CAPACITY.

That a party is sued in his representative capacity as trustee of a third party will not confer jurisdiction in equity where he does not bear such relation to the parties bringing the suit.

E. A. Hutchins, for complainants.

Platt & Bowers and *Man & Parsons*, for defendants.

WALLACE, C. J. The bill in this cause does not present a controversy which this court, sitting in equity, can entertain. It states a cause of action for which there is a plain and adequate remedy at law. The defendants have not demurred, but have answered, and do not even now raise the objection. But the court can only entertain the case made by the bill. As was said in *Washington R. R. v. Bradley*, 10 Wall. 299, 303: "It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs

must agree; that the court can only consider what is put in issue by the pleadings; that averments without proofs, and proofs without averments, are alike unavailing; and that the decree must conform to the scope and object of the prayer, and cannot go beyond them." Story, Eq. Pl. §§ 10, 481.

The objection that there is an adequate remedy at law raises a jurisdictional question, and will be enforced by the court *sua sponte*, although not raised by the pleadings nor suggested by counsel. *Oelricks v. Spain*, 15 Wall. 211. Even where it is not apparent upon the face of the bill, but the bill is framed so as to avoid the point, if in looking at the proofs it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill. *Lewis v. Cooks*, 23 Wall. 466.

There are precedents to the effect that it is too late to raise the question when the cause has gone to a hearing and the point has not been taken by demurrer or answer, but these precedents have not been followed in the federal courts. The case of *Wylie v. Coxe*, 15 How. 415, gives a partial sanction to such a rule by declaring "that it is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill."

In the present case it is apparent on the face of the bill that the remedy is at law.

The bill alleges that the complainants are the owners of 232 bonds, of \$1,000 each, issued by the city of New Orleans; that these bonds are in the possession of Fry, the trustee in bankruptcy of Schuchardt & Sons; that, although thereunto requested, Fry refuses to deliver the bonds to complainants; that Fry claims to hold the bonds as security for a pretended indebtedness owing from the assignees in bankruptcy of Caverre & Sons and from the receiver of the New Orleans Banking Association; that in fact the bonds were never hypothecated for any such indebtedness; that a sum of money is now on deposit in the Union Bank of London which belongs either to Fry or to the receiver of the New Orleans National Banking Association, and should be applied to the reduction of the alleged indebtedness for which Fry claims to hold the bonds as security; that several other persons who are made defendants "claim to have liens upon the said bonds or some portion thereof, or claims affecting the said bonds, the exact amount whereof your orators are ignorant, and the validity of which your orators dispute." The prayer of the bill is that Fry shall be

adjudged to deliver the bonds to the complainants, and that the rights of Fry and the receiver of the New Orleans Banking Company to the money in bank in London may be settled, and the deposit applied where it may belong.

Inasmuch as the complainants do not allege that they have any interest in the controversy between Fry and the receiver of the New Orleans Banking Association as to the deposit in the London bank, or that their rights are in any manner involved in that controversy, and nothing appears by which such a conclusion is suggested or can be inferred, all the allegations in regard to that controversy, for present purposes, may be deemed eliminated from the bill. The same may be said of the allegations in regard to the claims of the other defendants. It is not alleged, and nothing in the bill authorizes the inference, that such defendants have any control over the bonds, or any apparent or colorable title thereto, or interest therein. No relief is prayed for as to such defendants. If it had been, it can hardly be supposed the court would undertake to adjudicate upon the merits of the naked assertion of these defendants.

The case made by the bill, when analyzed, resolves itself into a controversy between the complainants and the defendant Fry as to Fry's right to withhold from the complainants the bonds to which complainants have the legal title, and Fry no title whatever. This controversy is not of equitable cognizance. An action at law for conversion, or in replevin, is the plain and appropriate remedy. If, indulging in surmise, it should be assumed that the defendants other than Fry have some interest in these bonds, as between themselves and Fry, which they may be able to assert against the complainants if the complainants recover against Fry, the case is no stronger. If the complainants are the owners of property which another wrongfully withholds, their cause of action at law is not changed into one of equitable cognizance because there are other parties who may assail their title after it has been established against him who wrongfully invades it, unless there are present some of the peculiar incidents which authorize the intervention of a court of equity. *Hipp v. Babin*, 19 How. 271.

The fact that Fry is sued as a trustee was suggested on the argument. The reply is, he is not sued as a trustee for the complainants, and no element of trust appears in the controversy set forth in the bill. He is sued in his representative capacity as a trustee in bankruptcy of Schuchardt & Sons, for acts for which he is liable personally, upon the theory of the bill.

Looking outside of the pleadings into the proofs, enough appears to indicate that if the complainants had asserted an equitable title to the bonds, the extent of which is to be determined by ascertaining and settling the rights of various other parties, the jurisdiction would have been properly invoked. The defendants Fry and Saborde and Reynes seem to have supposed that an answer instead of a cross-bill entitles them to affirmative relief. It is much to be regretted that the parties, all of whom are interested in a speedy settlement of the controversy, should have been subjected to the delay and expense of this fruitless proceeding.

The bill is dismissed for want of jurisdiction, without costs.

ORENDORF and others v. BUDLONG and others.

(Circuit Court, E. D. Michigan. May 8, 1882.)

1. EQUITY—SETTING ASIDE DEEDS—CONCURRENT JURISDICTION.

A court of equity has concurrent jurisdiction with a court of law to set aside deeds of real estate made to hinder, delay, and defraud creditors.

2. SAME—EXECUTION SALE—RIGHTS OF PURCHASER.

This jurisdiction may be invoked by a judgment creditor either before or after sale upon execution. A purchaser upon execution has the same right in this respect as a judgment creditor.

3. JUDGMENT DEBTOR—ASSETS.

The interest of a judgment debtor in lands fraudulently conveyed by him is a legal and not an equitable asset.

4. PRACTICE—DEMURRER OVERRULED—OPENING PROOFS.

Where a defendant answers and demurs, but takes no testimony in support of his answer, and elects to go to a hearing upon his demurrer, leave will not be granted to open proofs upon overruling the demurrer.

In Equity. On motion for rehearing.

This was a bill by a judgment creditor, who was also purchaser upon the execution sale, to set aside a fraudulent conveyance made by the judgment debtor. The proofs showed that judgment was obtained in this court against the defendant Philo H. Budlong, June 12, 1877, execution issued and levied July 3, 1877, upon lands theretofore owned by the defendant, and a certificate of the levy filed in the county register's office; that the lands were sold upon such execution November 30, 1877, and were bid in by the complainants. A certificate of sale under the statute was recorded December 1st. This judgment was rendered upon a bond given by the defendant

Budlong to the plaintiff's intestate. On October 8, 1875, prior to the rendition of this judgment, but after a breach in the condition of the bond, the defendant Philo H. Budlong deeded the property in question to his son George, who gave a mortgage back upon the same day for \$3,500,—the entire consideration,—payable ten years from date. This mortgage was assigned in January, 1877, to one Ranney, of Chicago, and again assigned by Ranney to defendant Markham in July following. On November 26th, four days before the sale upon execution, George Budlong conveyed to Markham by a deed which was not delivered or recorded until December 26th, but remained in escrow after its execution awaiting payment of the consideration. The bill prayed that these several conveyances be set aside as fraudulent, and that the property be adjudged to belong to complainants. The answer of defendant Markham (who is now in possession of the property) denied the several allegations of fraud, and also set up by way of demurrer the insufficiency of the bill. Defendant took no testimony, but relied solely upon his demurrer. A decree was ordered for complainants.

J. H. Campbell, for complainants.

George Woodruff, for defendant.

BROWN, D. J. There can be no doubt of the general jurisdiction of a court of equity to set aside fraudulent transfers of property at the instance of a judgment creditor. Such bills are constantly sustained, notwithstanding there may also be a remedy by ejectment, upon the ground that no remedy is full, adequate, and complete which leaves the fraudulent deed outstanding as an apparent cloud upon the title. Never since the case of *Bean v. Smith*, 2 Mas. 252, decided by Mr. Justice Story in 1821, has the power of the federal courts to entertain bills of this description been questioned. Bump, Fraud. Conv. 508; *Pratt v. Curtis*, 6 N. B. R. 139; *Buck v. Sherman*, 2 Doug. (Mich.) 176.

It was insisted, however, that this bill would not lie, because, under Comp. Laws, § 4628, it should have been filed within a year after the sale. The material parts of the section read as follows:

"All the real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for the sale and purchase of lands, whether in possession, reversion, or remainder, including lands fraudulently conveyed with intent to defeat, delay, or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities, and obligations, and may be levied upon and sold upon execution as hereinafter provided. * * * In case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of said execution to ascertain and determine

the rights and equities of said judgment debtor in the premises so levied upon; and that in case of a sale of said premises, after having ascertained and determined the interest of said judgment debtor in the premises so levied upon and sold, he shall, within one year, institute proceedings to ascertain and determine the same, and to settle the rights of parties in interest therein."

There are two sufficient answers to the complainants' proposition that these proceedings should have been taken within the year:

1. The jurisdiction of this court as a court of equity is uniform throughout the United States, and is unaffected by state laws. The Revised Statutes, § 913, declare the forms and modes of proceeding in suits of equity shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of common law. Under this provision, which is taken from the act of 1792, it has always been held that the jurisdiction and practice of the circuit courts in equity was uniform throughout the United States, and not subject to restriction or limitation by local statutes. *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Howland*, 4 Wheat. 108; *Boyle v. Zacharie*, 6 Pet. 648, 658; *Noonan v. Lee*, 2 Black, 499. It is a natural corollary of this proposition that we are not bound by the decisions of the state courts upon questions of equity jurisprudence. *Nedes v. Scott*, 13 How. 268.

2. The limitation of the section in question applies only to "equitable interests," while the interest of a creditor in the land of his debtor, fraudulently conveyed, is a legal and not an equitable asset. *Pultiam v. Taylor*, 50 Miss. 555.

That this is the proper construction to be placed upon this statute is also evident by referring to the section of the Revised Statutes of 1846, from which it was taken. This chapter (chapter 79, § 1) provides "that all the real estate of a debtor, whether in possession, reversion, or remainder, including lands fraudulently conveyed with intent to defeat, delay, or defraud creditors, * * * shall be subject to the payment of his debts, and may be sold on execution." This chapter makes no reference to equitable interests, except the equity of redemption of a mortgagor; and in *Trask v. Green*, 9 Mich. 358, and *Maynard v. Hoskins*, Id. 485, it was held that it did not reach the case of lands which a judgment debtor had purchased and caused to be conveyed by the vendor directly to a third person to defraud his creditors, and that such lands could only be reached by a creditor's bill, filed after the return of an execution unsatisfied.

To obviate in some measure the difficulty of reaching equitable interests the statute was amended in 1867 by including legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands. It is obvious that the limitation of the one year within which proceedings may be taken after the sale applies only to those equitable interests, and perhaps those of a mortgagor, and not to the case of lands fraudulently conveyed. This was also the opinion of the supreme court of this state in *Cranson v. Smith*, 10 N. W. Rep. 194.

But the main defence to this case is that this bill should have been filed in aid of the execution and before the sale; the theory of the defendant being that if the judgment creditor waits until the land is sold, and he has obtained his deed, there is a complete and adequate remedy at law in an action of ejectment, and that he can no longer invoke the aid of a court in equity. In support of this proposition defendant relies upon the case of *Cranson v. Smith*, above cited, recently decided by the supreme court of this state. This case is directly in point. Complainants have attempted to distinguish it from the case under consideration, in the fact that Markham's title was not taken and did not appear of record until after the sale on execution. But the deed from Budlong to his son was the one in controversy. This was taken long before the bill was filed. If this deed was valid, and George Budlong was a *bona fide* purchaser, then Markham's deed conveyed a perfect title to him, even though he had notice of the levy. On the other hand, if George Budlong was not a *bona fide* purchaser, Markham, having notice of the levy, could not take a good title from him. Complainants' case, then, must stand or fall with the view taken by this court of the correctness of the ruling in the case of *Cranson v. Smith*.

This case undoubtedly conflicts with the previous intimations of the supreme court upon the same question, although the point had never been directly decided. Thus, in *Cleland v. Taylor*, 3 Mich. 201, which was an action of ejectment by a judgment creditor, who was also a purchaser at the sheriff's sale, to test the validity of a deed made by the judgment debtor, it was assumed, both by the court and counsel, that the right of the plaintiff to have the deed set aside in a court of chancery was unquestioned. So, in *Messmore v. Haggard*, 9 N. W. Rep. 853, which was a bill by a judgment creditor, who was also purchaser upon execution, to set aside a fraudulent mortgage made by the judgment debtor, it was held that the bill should have been filed before the sale, for the reason that if the

judgment creditor could buy with a secret assurance that he was to have an unencumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. It was thought to be unfair to the other bidders and to the mortgagee to give him this advantage. "There can be no equity in permitting him to purchase the lands apparently subject to the mortgage, and then to have its lien annulled afterwards." But in delivering the opinion Mr. Justice Cooley draws a clear distinction between that case and one where the judgment debtor has made a fraudulent conveyance of all his interest in the land:

"In those cases," he says, "the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it, and take his measures accordingly. So would all persons, who should be inclined to be bidders at the sale, understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed, but as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would be obviously unimportant."

But in *Cranson v. Smith* the reservation thus made by Mr. Justice Cooley, (which seems to us unanswerable,) of cases like the present, where all bidders stand upon an equality, is expressly overruled. The reasons for his conclusion are stated as follows by Mr. Justice Marston:

"At the time the levy and sale was made under the execution, complainant, the judgment creditor, had full and ample knowledge of the conveyance from John F. Smith to his wife, the deed having been duly recorded. The complainant did not then, although he had an undoubted right to, file his bill in aid of his execution, and, if the conveyance was fraudulent, have it set aside, thus restoring and revesting the legal title in the judgment debtor, and thus enable intending purchasers to compete with him at the sale. He preferred to leave the matter not only in doubt as to the fraudulent character of the conveyance, but thereby to prevent any person from bidding against him, as purchasers under the levy made and interest sold could not have moved to have the conveyance declared void. The complainant could not thus acquire the title, and then come into a court of equity and ask to have the deed set aside."

But why cannot a purchaser under an execution sale move to have the conveyance declared void? We know of no reason. Clearly the authorities are in his favor. Indeed, the judgment creditor himself,

If he purchases at an execution sale, must take proceedings as purchaser and not as judgment creditor, to attack the conveyance. His rights as creditor are merged in those of purchaser. Bump, Fraud. Conv. 488; *Chandler v. Von Roeder*, 24 How. 224; *Cole v. White*, 24 Wend. 116; *Murphy v. Orr*, 32 Ill. 489; *Barr v. Hatch*, 3 Ohio, 527; *King v. Bailey*, 6 Mo. 575.

In *Sands v. Hildreth*, 14 Johns. 497, the court observes:

"It has been contended that the respondent is not invested with the rights of Whitney and others, under whose judgment he became a purchaser at a public sale made by the sheriff of Kings county under executions on those judgments. The statute, it is urged, protects creditors only from fraudulent deeds, and not a person standing in the situation of respondent. This proposition is, in my judgment, without any foundation. All the respondent's right to the land in controversy is derived from and under the judgments under which he purchased. The judgments are his title; and he is placed, by the judicial sale which took place, precisely in the place of the creditors. If the title acquired under the sheriff's sale fails, for want of title in the person against whom the execution issues, the purchaser is entitled to a restitution of the money paid. How can it, then, be pretended that the respondent is not clothed with all the rights of the judgment creditors, if they are liable to refund all that has been advanced by the respondent on the failure of the title he bought? The idea itself is novel, and unsupported by reason or authority."

And, even if the judgment creditor buys the land at less than its value, who is entitled to complain? Not the fraudulent transferee, for, as against the creditors of the grantor, his deed is as if it never had been written. Not the fraudulent grantor, because he has conveyed away his title by deed which is perfectly good as to himself, and every one except his creditors. We know of no reason why the rule which demands that a complainant shall come into a court of equity with clean hands does not apply equally to a defence set up in that court which is not available in an action at law. Now, without deciding whether a fraudulent debtor or his fraudulent grantee is entitled to any surplus that may be realized at the sale over and above the judgment debt, it seems to us that neither of them ought to be heard in a court of equity to complain that the judgment creditor did not file his bill before the sale, and have their deed set aside for fraud. "*Nemo allegans suam turpitudinem audiendus est.*" "He that hath committed iniquity shall not have equity."

Conceding the rule established in *Messmore v. Haggard* to be correct, it seems to us that the case of *Cranson v. Smith*, so far from being in affirmance of it, is a clear departure from it. We know of no authority which supports the principle announced in that case. None

are cited in the opinion, and, so far as our researches have extended, none can be found in the books. The leading case upon the subject is that of *Hildreth v. Sands*, 2 Johns. Ch. 35. This was a bill by a purchaser upon execution to set aside as fraudulent a deed of lands made prior to the judgment. In speaking of the defence, which was held good in *Cranson v. Smith*, Chancellor Kent observes:

"If it [the statute of Elizabeth] protects the creditor, it must protect his sale, and the purchaser under his judgment. The creditor, on any other construction, would be deprived of the fruit of his judgment, and the execution would be nugatory. There can be no doubt but that the plaintiff, as a purchaser under Whitney's judgment, is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place and is armed with his rights; and though he be a purchaser at a very low price, yet it was a fair purchase in the regular course of law, and it was owing to the unwarrantable acts of the debtor himself, in throwing a cloud over the title, that his property was thus sacrificed. It does not become the parties to a fraudulent deed to complain of the plaintiff's cheap purchase. However it may be regretted that the property has yielded but a very small compensation to the creditors, this fact cannot interfere with the question of right. The auction price was an accidental thing, growing out of the peculiar circumstances of the case, and affects only the parties concerned; but whether such a fraudulent conveyance shall stand or fall is deeply interesting to the whole community."

On appeal to the court of errors this decree of the learned chancellor was affirmed. 14 Johns. 493.

In the following cases, also, it was directly decided that a bill of this description might be filed as well after as before the sale under a judgment: *Gallman v. Perrie*, 47 Miss. 131, 140; *Mays v. Rose*, 1 Freeman, Ch. 703; *Frakes v. Brown*, 2 Blackf. 295; *Kellogg v. Wood*, 4 Paige, 578; *Carpenter v. Simmons*, 1 Rob. 360; *Porter v. Parmley*, 14 Abb. (N. S.) 16; *Best v. Staple*, 61 N. Y. 71; *Barr v. Hatch*, 3 Ohio, 527. In the following cases bills of this description have been sustained, though the point was not discussed: *Pope v. Pope*, 40 Miss. 516; *Pepper v. Carter*, 11 Mo. 540; *Dargan v. Waring*, 11 Ala. 988; *White v. Williams*, 1 Paige, 508; *Fisher v. Lewis*, 69 Mo. 629.

It seems to us there can be no doubt of the power of this court to entertain a bill of this description.

In so far as the merits are concerned, the testimony makes a clear case for the complainant. At the time of the deed to George Budlong, Philo was in default upon his bond, and a right of action had accrued. It was almost inevitable that a suit would be brought, and a judgment obtained against him. In this situation of things he conveys to his son George, who was without means and dependent upon

his father for support, and takes back a mortgage for the entire purchase money. This mortgage he assigns to Ranney, who was his brother-in-law, and a man without property, feeble in health, and partially, at least, dependent on his relatives for support. Ranney appears to have discharged this mortgage at the time of the sale to Markham, at Budlong's request, and nothing seems to have been paid him. There was no change in the possession or control of the property. Hill, who was working the mill under an arrangement with Philo, when the sale to George was made, testifies that George made no claim to the ownership or control. Philo went on as before, collected the earnings of the mill, settled with Hill for the profits up to June, 1876, when Hill went out. Philo then took the books containing the accounts up to that time. During that period, George worked a part of the time by the day in the mill. After the deed to George was made and recorded, Hill, having had his attention called to it, asked Philo about it, and whether he wanted him to run the mill any longer. Philo replied that he did. Hill then said, "I understand that you have sold the mill to George, and I suppose you want George to run it." Philo says, "I want you to run it; I own the mill as I have always owned it." Another witness testifies that in the fall of 1877, two years after the deed to George, Philo hired him to work in the mill and paid him for it, and also paid him for work done during 1876 and 1877.

We do not think that Markham can be considered a *bona fide* purchaser, or entitled to complain of this decree. He was a near neighbor; lived next door to the Budlongs and near the mill for many years, and during all of these transactions. He knew that George was in indigent circumstances, and that Philo was embarrassed and becoming insolvent. He knew of the complainant's judgment, and had actual personal knowledge of the levy and sale of the mill property. The notice of sale was posted on his land and near his door. The witness Diehl saw the notice there October 18, 1877, went in, saw Markham, and called his attention to it, telling him that the mill was advertised. Another witness saw the notice of sale there along in November. Indeed, Markham admits in his answer that he knew of the levy and certificate on one description, and he could not have failed to know of the levy upon the description involved in this case, as they were together. After the sale and on the same day, he met the witness Joslin, who had been present at the sale, and asked him to whom the mill property was sold and how much it brought. This was November 30, 1877. After this, and on December 26th, he took

his deed, while the marshal's certificate of sale was on record. This of itself was notice to him. *Atwood v. Bearrs*, 45 Mich. 469. Nor do we think that the decree ought to be opened to let in Markham's defence. The case was put at issue by filing a replication August 28, 1880. The demurrer was never set down for hearing. On October 1st counsel on both sides signed a stipulation to proceed to take testimony. A commissioner was then agreed upon. Complainants' proofs were closed in November, and the time for taking of defendant's testimony was extended from time to time until the seventh of April, when an order for the closing of proofs was entered. Late in April defendant made an effort to take the testimony of one witness, but abandoned it, and consented to go to a hearing upon his demurrer, relying upon that as a defence. Rule 69 requires that "testimony in equity cases shall be taken within three months after the case is at issue," and we are clearly of the opinion that defendant has not made a case for the opening of proofs now. No request for further time was made, no request for postponement, and counsel deliberately consented to submit the case upon the demurrer. But an equally conclusive answer is found in the fact that the affidavits do not disclose any defence which would be available to Markham. They tend to show that he made a bargain for the land in 1877 at \$700, but the answer alleges that there was no money paid until December 26, (the day the deed was delivered,) when the marshal's certificate of levy was on file, and Markham had actual notice that the property was sold upon execution.

The motion for the rehearing must therefore be denied.

SMITH v. GAGE.

(Circuit Court, N. D. Illinois. April 24, 1882.)

1. TAX TITLE—VALIDITY—BURNT RECORDS ACT—PROCEEDINGS.

The circuit court has jurisdiction to consider and pass upon the validity of a claim of title under a tax deed accrued subsequent to the destruction of the records, in an action by bill to restore title under the burnt records act. The practice in such cases stated.

2. ACTUAL POSSESSION—NOTICE OF TIME TO REDEEM.

Where a party was in actual possession of the premises, it is the duty of the person seeking to obtain title through a tax sale to serve personal notice on the occupant of the premises of the expiration of the time to redeem from the tax sale to render the tax deed valid.

3. SAME—DUTY TO PAY TAXES AND ASSESSMENTS.

A party in the possession of land, to whose benefit has ensued the payment of subsequent taxes and assessments upon such land by a party who holds a tax deed therefor, should not have the tax title set aside except upon such terms as will reimburse the holder of the tax title for the money he has paid for the purpose of protecting the property.

4. CLOUD ON TITLE—REMEDIES.

Where complainant seeks in a court of equity relief from a tax deed which is a cloud on the title to her land, she should pay the amount required to redeem the land, with interest from the time of redemption, as a condition precedent to her right to relief. At law her remedy is by action of ejectment.

Monroe & Leddy, for complainant.

A. N. Gage, for defendant.

BLODGETT, D. J. This bill was originally filed by the complainant in the state court, under what is termed the "Burnt Records Act," for the purpose of restoring the complainant's title; the allegations being in substance that the complainant had a title in fee to the lot mentioned in the bill, deducible by a chain of conveyances from the United States to herself, all of which were of record in the recorder's office of Cook county, Illinois, and that by the destruction of the records of the county in the great fire of October, 1871, all these recorded evidences of title had been destroyed, and that she had lost her original deed, and therefore had no paper evidence of title on which to base her claim to the property. She made various persons parties to the suit, among whom was Asahel H. Gage, who, she charged, claimed some title to the property. The case came to this court, and Gage answered here, setting out in substance that he holds a tax title to the property, which was obtained under a tax sale for the first instalment of the South park assessment, the sale having been made on the eleventh of October, 1873, for the assessment of 1872, and the tax deed having been made to him March 3, 1876.

There has been no resistance to the complainant's case, except as to whether this tax title can be attacked in this form of proceeding, and as to the validity of this tax deed; complainant having, by an amended bill, charged that the assessment was illegally made, the sale illegally conducted, and the deed void for want of proper notice of the time when the redemption would expire.

As to the jurisdiction of the court to consider and pass upon the validity of this tax title in this form of proceeding, this defendant's claim of title under his tax deed having accrued subsequent to the destruction of the records, I at first had some doubts, but a more careful examination of the statute authorizing this form of action has

led me to the conclusion that complainant may, in this action, attack defendant's subsequently-acquired title, and my reasons for this conclusion are briefly these:

The act provides (section 16, c. 116, Rev. St. Ill.) that the petition or bill for restoration of title shall set out—

First. The extent of the estate in the land in question claimed by the complainant or petitioner, and from whom, when, and in what mode he derived his title thereto. He shall give the names of all persons owning or claiming any estate in fee in said lands, or any part thereof, and also all persons to whom any such lands have been conveyed, and the deed or deeds of such conveyances as shall have been recorded in the office of the recorder of deeds since the time of the destruction of such records, and prior to the filing of such petition, and their residence, so far as the same are known.

Second. All persons so named in the petition shall be made defendants, and shall be notified of said suit by summons, or by publication of notice in the same manner as may be required in chancery proceedings in this state.

Third. By section 18 any person interested may oppose such petition, may demur to or answer the bill, or file a cross-bill, if he desires to do so.

Fourth. By section 20 it is declared that it shall be competent for the court, by its decree in such cases, to determine in whom the title in any or all of the lands described in the petition is vested, whether in the petitioner or any other of the parties before the court.

Here, it will be seen, is ample provision for bringing all claimants to any title or interests in the lands before the court, and it is made the duty of the court to determine in which of the persons so before it the title is vested. It seems to me to have been the purpose of the legislature to make this proceeding a sort of drag-net into which all conflicting claimants of title or interest in the land might be drawn, and where the court, with all the parties before it, should determine their respective rights. It is not limited to titles or claims which accrued before the destruction of the records, but in express terms provides that "all persons to whom such lands shall have been conveyed, and the deed or deeds of such conveyance shall have been recorded in the office of the recorder of deeds of such county, since the destruction of the records," shall be made parties to the proceedings, evidently intending that the petitioner must bring in all persons who appear of record to have any deed or conveyance of any interest in the land, so that their respective titles or claims may be considered and passed upon. It is further provided that unknown owners or claimants may be brought in under the designation of "all whom it may concern;" and the decree rendered in such proceeding is to be final and conclusive, unless appealed within a certain time limited by the act, except as to persons in actual possession of the premises, or persons to whom

the lands have been conveyed, and whose deeds have been recorded since the destruction of the records, and prior to the time of filing the petition, who are not made defendants by name.

It is possible that the court, on the final hearing of such a case, may in its discretion as a court of equity, where two conflicting titles are represented, the validity of which can be determined in a court of law, by the express terms of this decree remit the parties holding such titles to a court of law for a trial of their rights; but this would be purely a matter of equitable discretion, and does not limit the power of the court in this proceeding to settle the entire title by its decree.

As to the validity of this tax deed, no proof is offered showing that the assessment was not regularly and legally made, and the judgment properly rendered against the land for default of payment, nor that the sale was not legally conducted; but the only point insisted upon at the hearing was that the deed was void for want of proper notice to the occupant of the land of the time when the redemption would expire.

It is conceded that the holder of a certificate of purchase of its tax sale, assuming that there was no person in possession or occupation of this land, and that the person in whose name it was assessed could not be found in the country, caused a notice of the time of the purchase at such tax sale, and when the redemption would expire, to be published in a newspaper not more than five months nor less than three months before the time of redemption would expire, and on filing proof of the publication of such notice, an affidavit to the effect that the land was unoccupied, and the person in whose name the land was assessed could not be found in the county, with the county clerk, the tax deed in question was issued; but complainant contends that this land was in fact at the time of this tax sale, and until after the execution and delivery of this tax deed, in the actual possession of a Mrs. McCarthy, and the conflicting proof in the case is all centered around the nature and extent of her occupation of the premises. I think the result of the proof is to show that some years prior to this assessment and tax sale the husband of Mrs. McCarthy had built a house on the lot adjoining the lot now in question, and enclosed a portion of the lot in question as a garden and yard,—his enclosure taking in about 30 feet in the front of the lot, and extending back in a diagonal line so as to take in six or ten feet of the rear,—and some of the out-buildings or appurtenances of the McCarthy premises were erected on this lot.

McCarthy, it seems, had died before this tax sale, and his widow and family had remained in possession. The fence had become somewhat out of repair, and proof was put in on the part of defendant tending to show that it had ceased to be an enclosure; but I think the clear preponderance of the proof is that a portion of this lot was, at the time this notice was published, in the actual possession and occupancy of Mrs. McCarthy, and within her enclosure; that the fence was sufficiently in repair to indicate and maintain such possession; that an intruder into the portion of the lot within this enclosure would have been a trespasser upon Mrs. McCarthy's possession. True, the proof does not show that Mrs. McCarthy was the tenant of this complainant, or of any person through whom the complainant claims title, but I think we must assume she was there with the knowledge and perhaps by the permission of the owner of the fee. She was certainly "an occupant" within the meaning of the constitution and statutes of this state. Section 5, art. 9, Const. 1870, and section 216, c. 120, Rev. St. Ill.

It was the duty of the person seeking to obtain a tax title, under a sale for tax or assessment, to serve personal notice on such occupant as a condition precedent to the issue of a valid tax deed; but this complainant has come into a court of equity seeking not only to have her own title established, but also to have this tax title set aside as a cloud upon her title; and under the familiar principle that he that seeks equity must do equity, I think this court should not set this tax title aside and declare it void except on condition that complainant pay the amount required to redeem the premises when the time for redemption expired, and interest thereon at the rate of 6 per cent. per annum since that time, and also pay all taxes and assessments which the defendant Gage has paid on said premises since his purchase, together with interest thereon at 6 per cent.

It may be urged that a tax title is only to be obtained *strictissima juris*, and that the defendant, not having complied with the conditions precedent required by the constitution and statute, must be held to have forfeited the inchoate title acquired by his purchase, and this would probably be the rule in a suit in an ejectment upon the facts as I find them here; but the fact is also palpable that the holder of this tax title has paid this assessment—that this payment and that of the subsequent taxes and assessments have enured to the benefit of this complainant, and she should not have this tax title set aside except upon such terms as will reimburse the defendant for

the money he has paid for the purpose of protecting her property. The complainant was not obliged to file this petition. She could, if she had chosen so to do, have brought ejectment, made parol proof of her title, and contested the validity of this tax deed at law; but she has preferred to come into a court of equity to get relief, and must make the defendant whole, as I think, to the same extent as if she had redeemed in apt time from the tax purchase.

JACKSON, Receiver, v. FOOTE.

(Circuit Court, N. D. Illinois. April 17, 1882.)

1. CONTRACT OF SALE—FUTURE DELIVERY—OPTION DEALS.

Where a firm of brokers and commission merchants, dealing in grain and provisions on the board of trade in Chicago, transacted business for its customers, some of whom were buyers and some sellers, under the rules and regulations of the board, intending to deal in time contracts and to settle the differences, so as to avoid paying for and carrying the commodities bought, *held*, not a dealing in "options to buy or sell at a future time," and is not within the prohibition of the statute of Illinois. St. Ill. c. 38, § 130.

2. SAME—CONTRACTS VALID AND BINDING.

Where the indebtedness which accrued from the defendant to the firm of brokers was for commissions earned by the firm in making trades for the defendant, duly authorized by him, and for moneys actually paid by the firm in the settlement of differences in such trades, and that none of these differences were paid upon "options to buy or sell grain or other commodities at a further day," but upon sales or purchases of grain or other commodities, where the seller had only an option as to the time of delivery, such contracts are not within the Illinois statute, and are valid and binding upon the parties.

3. SAME—GUARANTY ON NOTES—BONA FIDE HOLDER.

Where, under such a contract, defendant became indebted to the firm for balances, and on final settlement gave to the firm the notes sued on, the payment of which he guaranteed, and the notes were given to the bank, with defendant's guaranty written thereon, in payment of a debt due the bank by the firm, even though the demand of the firm was tainted as a gambling claim at common law, defendant cannot be heard to set up the illegality of the dealings between himself and the firm as a defence to these guaranties in the hands of a *bona fide* holder.

4. GUARANTY—BONA FIDE HOLDER.

A guaranty in the hands of a *bona fide* holder is valid, and not affected by any of the equities between the original parties.

Dent & Black and Lyman & Jackson, for plaintiff.

L. H. Bisbee and Albion Cate, for defendant.

BLODGETT, D. J. This is a suit on a guaranty of payment by defendant of two promissory notes, of \$5,000 each, made by the trustees

of the estate of Ira Couch, both dated July 1, 1876, and made payable to defendant,—one on July 1 and the other on October 1, 1877, with interest at the rate of 8 per cent. per annum.

The plaintiff is receiver of the Third National Bank of this city, and the notes in question were delivered to the bank with the guaranty of defendant written thereon, about December 30, 1876, with other notes, as collateral security for the payment of a note of S. G. Hooker & Co. to the bank for the sum of \$13,900, due from that firm to the bank for money loaned on the note of Hooker & Co.; being dated December 30, 1876, payable to the bank in 90 days after date, with interest at 10 per cent. per annum.

The defence insisted on at the trial is that the two notes in question were transferred by the defendant to the firm of S. G. Hooker & Co. in settlement of a claim or indebtedness due from the defendant to said firm for certain gambling dealings, conducted by the firm for the defendant, on the Chicago board of trade.

The facts, as developed by the proof, appear to be that in the fall of 1874, and for about two years thereafter, the firm of S. G. Hooker & Co. were brokers and commission merchants, dealing in grain and provisions on the board of trade in this city, were members of the board, and transacted business for their customers under its rules and regulations; that Foote had some dealings on the board through another broker, in which his broker had taken and paid for a large quantity of oats which had been bought on an order of the defendant, but the expenses of storing, interest, etc., had been so large that the defendant had become dissatisfied, and some difficulty occurred in effecting a settlement with his broker. Mr. Hooker, of the firm of S. G. Hooker & Co., was applied to and counselled with by the defendant in securing this settlement, and Hooker, being an old friend of the defendant, advised him that if he wished to speculate or deal any more on the board of trade he had better do it with his, Hooker's, firm. The defendant assented to this, provided he could only trade or deal in differences; that is, Hooker's firm was not to take in or carry any commodities bought, but defendant was only to pay or receive the differences between the selling and buying or buying and selling prices of the commodities dealt in.

In pursuance of this arrangement the defendant from time to time gave orders to Hooker & Co. to buy or sell commodities on the board for his account, and they executed these orders by buying or selling as directed on the board in the usual form of such transactions where the seller had the option to deliver within a certain time,—as for

illustration, during the whole of the next month, or during the first half or last half of the next month, or of the month in which the transaction took place,—the only option in the transaction being as to the time within which the seller was allowed to make delivery. These dealings continued until some time in May or June, 1876, Hooker & Co. buying or selling grain, pork, or lard as directed by the defendant, and settling the differences; paying the money when the market was against the defendant, and receiving it for him when the market was in his favor; charging to him whatever sums were paid in settling differences when they were against him, and giving him credit when they received differences in his favor. In two or three transactions the firm seems to have taken in and paid for grain and provisions bought for defendant and held them for a short time, and then sold them, charging the defendant with the interest, storage, etc., incident to such transactions. The defendant was also debited on the books of the firm with commissions for transacting the business, and with divers sums of money paid him from time to time, so that, at the time the dealings of the firm for the defendant closed, he stood debited to them on their books in the sum of about \$22,000. In payment of this indebtedness the defendant transferred and delivered to Hooker & Co. four notes of \$5,000 each held by him against the Couch estate, the payment of which notes he guarantied and two of which are the notes in question, and the firm of Hooker & Co. transferred the two notes now before the court, with the defendant's guaranty of payment thereon, to the Third National Bank of Chicago, to secure their own indebtedness to the bank for money borrowed.

The testimony in the case fully satisfies me that Mr. Hooker, when he assumed for his firm to act as the defendant broker in his dealings on the board of trade, did not contemplate or intend to make any different transactions for the defendant than for his other customers. He undoubtedly intended to make purchases or sales where the buyer had an option as to the time within which to make delivery, and he intended to so conduct the defendant's transactions as to avoid taking and paying for any article bought, and he seems to have explained to the defendant how, by reason of his many customers, some of whom were sellers and others buyers on the market, he could so manage the defendant's deals that he need not take any commodity bought, but could settle simply the difference between the purchase price and the market price, when the seller had the right of delivery. Hooker did not, I am satisfied from the proof, intend to

deal in "options to buy or sell at a future time," such as are prohibited by the Illinois statutes, (Rev. St. Ill. c. 38, § 130,) but intended, as I have said, to deal in time contracts, and to settle the differences so as to avoid paying for and carrying the commodities bought. I am also satisfied that, while the defendant may have known but little when he commenced with this firm as to the mode in which the business was to be transacted by them for him, yet he did not contemplate dealing in "puts and calls," or "options to buy and sell at a future time," and that he was very soon aware of the forms and modes in which the business was done for him by the firm. He intended without doubt that his brokers should so manage his trades that differences should be paid or collected, instead of his taking or holding the article dealt in, or having his broker do it for him and at his expense. He may have contemplated dealing wholly in differences to such an extent as to make the transactions such as have been construed by the courts of this state to be wager contracts or gambling contracts at common law; but he did not, I am satisfied, intend that his brokers should make for him such contracts as are expressly made illegal by the Illinois statutes, but, at most, they were to be transactions where it was not intended that any commodity should be actually received or delivered, but that he was to deal in differences only, coming perhaps within the rule laid down by the supreme court of this state in *Lyon v. Culbertson*, 83 Ill. 33, where the court said:

"The fact that no wheat was offered and demanded shows that neither party expected the delivery of any wheat, but in case of default in keeping margins good, or even as to the time of delivery, they only expected to settle the contract on the basis of differences, without even performing or offering to perform his part of the agreement, and if this was the agreement it was only gambling on the price of wheat. If such gambling transactions shall be permitted, it must eventually lead to what are called 'corners,' which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain as well as the producer, and are pernicious and highly demoralizing to the trade. A contract to be thus settled is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is in all but name a gambling on the price of the commodity, and the change of names never changes the quality or nature of things."

In other words, as I understand the court in this case, where there is an intention to deal only in differences, the transaction is held to be a wager contract at common law.

It is also equally evident from the proof that the indebtedness which accrued from the defendant to S. G. Hooker & Co. was for commissions earned by the firm in making trades for the defendant, duly authorized by him, and for moneys actually paid by the firm in the settlement of differences in such trades, and that none of these differences were paid upon "options to buy or sell grain or other commodities at a future day," but upon sales or purchases of grain or other commodities where the seller had only an option as to the time of delivery,—contracts which have been held not to be within the Illinois statutes, and to be valid and binding upon the parties. *Pixley v. Boynton*, 79 Ill. 351; *Wolcott v. Heath*, 78 Ill. 433; *Cole v. Milmine*, 88 Ill. 349; *Porter v. Viets*, 1 Biss. 177; *Clarke v. Foss*, 7 Biss. 540; 14 Bush, (Ky.) 727; *Gelbert v. Gaugar*, 10 Leg. N. 340.

Assuming, then, that the defendant, by his agreement with Hooker & Co., intended to deal only in differences, and that the bulk of the debit against him on the books of the firm accrued for differences paid by the firm on trades made for him in pursuance of this agreement, the only question is, do these facts so taint this paper as to make this guaranty of payment void in the hands of this bank? There is no dispute but what the bank is a *bona fide* holder of these notes, with defendant's guaranty thereon, taken for value before due and without notice of any defence. The statute of Illinois makes notes and other securities given in payment of gambling contracts to "sell or buy grain or other commodities at a future time" void in the hands of any assignee or holder; but the transactions out of which this indebtedness between Hooker & Co. and the defendant arose were not "options to buy or sell at a future time," but were contracts of sale, in which the seller was bound to deliver at a future time within certain limits. They were not, therefore, gambling contracts within the Illinois statutes. They may have been, as I have already said, gambling or wager contracts at common law, to such an extent as that if Hooker & Co. had sued the defendant he could have successfully defended; but the common law will not help either party to a gambling contract; it simply leaves them where it finds them. If one, having lost money by gambling or on a wager, pays it, the law will not aid him to recover it back from the owner. 2 Smith, Lead. Cas. 307; *Gregory v. King*, 58 Ill. 169.

It seems to me to follow, then, as a necessary conclusion, that the defendant having delivered these notes with his guaranty upon them to Hooker & Co. in settlement of their demand against him, even though their demand was tainted as a gambling claim at common

law, he cannot be allowed to set up the illegality of the dealings between himself and Hooker & Co. as a defence to these guaranties in the hands of a *bona fide* holder. He has put this paper, with his guaranty affixed to it, afloat upon the market. Unless a clear case of violation of the statute is made out, and the burden of making such a case is upon the defendant, this guaranty in the hands of a *bona fide* holder is valid, and not tainted by any of the defences between the original parties. I may say further that it seems from the defendant's own testimony and from the accounts rendered—a transcript of S. G. Hooker & Co.'s books—that the settlement in question and upon which these notes and guaranties were given, was for an account into which cash paid, commissions, and other elements entered which were not of a gambling nature; and it is extremely doubtful in my mind, even if suit had been brought by S. G. Hooker & Co. against the defendant, he could, upon the showing now made upon this trial, have successfully defended against their claim.

The issues are found for the plaintiff.

See *Melchert v. Am. U. Tel. Co.* 11 FED. REP. 201, note.

EDWARDS, Trustee, v. WRAY and others.

(Circuit Court, D. Indiana. May, 1882.)

1. MORTGAGEE IN POSSESSION—ENTITLED TO POSSESSION AND RENTS.

A mortgagee in possession of the mortgaged premises with the consent of the mortgagor is entitled to keep such possession and collect the rents on the property until the mortgage debt is paid, even though the mortgage be held to be a mere lien.

2. SAME—PAROL AGREEMENT FOR POSSESSION.

If a mortgage does not provide that the mortgagee shall be entitled to the possession of the premises, a subsequent parol agreement to that effect can be made, and if the mortgagee goes into possession under it the contract between the parties then stands as though this provision were contained in the mortgage.

3. SAME—PRIOR RIGHT TO RENTS OVER PURCHASER IN EXECUTION.

Possession so taken cannot be disturbed by a purchaser of the property on execution sale on a judgment, the lien of which attached after such possession was taken, and such mortgagee is entitled to hold any rents collected by him as against such purchaser, notwithstanding a statutory provision which makes the occupant of property sold at judicial sale the tenant of the purchaser of the same.

Submitted on Bill and Answer.

Baker, Hord & Hendricks, for complainant.

Dailey & Pickerill, for defendant T. W. Hill.

GRESHAM, D. J. This is a suit to foreclose a mortgage. In addition to the usual averments the complainant alleges that in September, 1879, and some time before the filing of his bill, by an agreement between the mortgagor and himself the possession of the mortgaged premises was turned over to him and has been ever since retained by him. He sets out an itemized statement of the rents collected which have been applied towards the payment of the interest on his mortgage debt. His right to so apply a part of these rents is denied by the defendant T. Wiley Hill, who, in his answer, claims that he is entitled to all the rents that have accrued since the third day of July, 1880, at which time he bought the mortgaged premises on an execution sale made on a judgment junior to complainant's mortgage. This claim is based upon the provisions of section 1 of an act which went into effect March 31, 1879, relative to the redemption of real estate sold on execution or decree of sale. That section is as follows:

"Section 1. Be it enacted by the general assembly of the state of Indiana, that, whenever real estate or any interest therein shall be sold on execution, the sheriff or other officer making the sale shall issue to the purchaser a certificate of purchase. The certificate shall entitle the purchaser, his heirs, or assigns to a deed of conveyance, to be executed by the proper officer, at the expiration of the time allowed for redemption, unless the property sold shall have been previously redeemed. The owner of the property shall be entitled to the possession thereof during the time the same is subject to redemption; but if the same is not redeemed, he shall be liable to the purchaser, his heirs, or assigns for the reasonable rents, profits, or use thereof; provided, if such owner is not the actual occupant of the premises sold, but the same be occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rent or use and occupation of the premises, and may be treated in all respects as the tenant of the purchaser, who shall, in case the property is redeemed, allow, as a payment upon his judgment, the amount of the rent by him collected."

Hill insists that under this section from the time he obtained his certificate of purchase the complainant became liable to him as the occupant of the property. In other words, his position is that the agreement between the mortgagor and the complainant, although made in good faith, must give way to the provisions of the statute.

The question, then, is, does the section of the statute quoted apply to the complainant's possession? It is admitted that the complainant is a mortgagee in possession with the consent of the mortgagor, and that aside from the statute under consideration he has a

right to hold that possession and collect the rents on the property until his mortgage is paid. This is the rule at common law, even where the lien theory of mortgages obtains. *Russell v. Ely*, 2 Black, 575; *Witherell v. Wiberg*, 4 Sawy. 232; *Phyffe v. Riley*, 15 Wend. 248; *Hubbell v. Moulson*, 54 N. Y. 225; *Hennesy v. Farrell*, 20 Wis. 42; *Dutton v. Warschauer*, 21 Cal. 609; *Roberts v. Sutherland*, 4 Or. 219.

In this state there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same." The mortgage in suit did not contain such a provision. Notwithstanding this fact, the parties to this mortgage could enter into a parol agreement that the mortgagee should take possession of the mortgaged premises, and could carry out such an agreement by putting the mortgagee in possession. *Parker v. Hubble*, 75 Ind. 580. This was in fact done in this case, and when this parol agreement was so executed by the surrender of possession on the part of the mortgagor the contract between the parties to the mortgage then stood as though it had been specifically provided in the mortgage that the mortgagee should be entitled to the possession of the mortgaged premises.

The redemption statute of 1879 was not intended to defeat or abrogate rights acquired under such a contract. Its effect was meant to be limited to sales of property which should be sold independently of any contract pertaining to its use or possession. Its purpose was to furnish a rule which should be applicable to sales of real estate, the dominion over which the judgment debtor or his assigns still held. It does not contemplate an interference with senior rights or equities created prior to the attaching of the judgment lien that is to be enforced by the sale. It relates to a remedy for the enforcement of judgments, and it does not and could not inhibit a contract relation that might curtail that remedy. It is true that this statute was in force when the agreement in question was made, but, no fraud being charged, the parties to that agreement had the right to enter into it, and the complainant is entitled to be protected in the rights thus secured notwithstanding the statute. *Edwards v. Woodbury*, 1 McCrary 429; [S. C. 3 FED. REP. 14.]

Whether this proposition would be true if the lien of the judgment had attached prior to the making of the arrangement between the mortgagor and the mortgagee, need not be decided. The pleadings show that the agreement under which the complainant went into possession of the mortgaged premises was made before the judgment

under which Hill derives title became a lien on the real estate. When that lien came into existence it of necessity attached to real estate charged with the burden of the complainant's right of possession. It was a lien only on such an estate in the property in controversy as the judgment debtor at that time held, and the execution sale was made subject to any liens, pledges, or rights that he had fastened upon the real estate in favor of any other party. *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562.

The complainant was in possession by his tenants, and this was notice of his rights. *Bank v. Flagg*, 3 Barb. Ch. 317; *Wright v. Wood*, 23 Pa. St. 120; *Franz v. Orton*, 75 Ill. 100; *Dickey v. Lyon*, 19 Iowa, 544; *O'Rourke v. O'Connor*, 39 Cal. 442.

The rights of complainant in the mortgaged premises as mortgagee in possession were no more affected by the execution sale than were his rights under his mortgage. They alike remained intact. The same equitable principles that authorize the appointment of a receiver of mortgaged property may be invoked in this case to sustain the arrangement between the mortgagor and mortgagee by which the latter took possession of the premises. The mortgagor turned over the property to the mortgagee in order that the rents might be applied to the payment of interest, but it appears that the interest is greatly in default. It is to be presumed, therefore, that the mortgagor is insolvent or seriously embarrassed, and that the premises are not an adequate security for the debt, and that these facts were considered by the parties when the arrangement was made. This court has uniformly held that under these circumstances a receiver should be appointed to protect the interests of the mortgagee. The arrangement made secured to the mortgagee without the aid of a court just what the court would have given him as against not only the mortgagor but as against all junior lienholders. The purposes of the parties to this agreement were of so equitable a character that they should be effectuated and not defeated.

The provisions of the redemption act of 1879 furnish no reason why the court should refuse the appointment of a receiver upon proper showing, and it is equally clear that an amicable arrangement between a mortgagor and mortgagee, which effected at once what a receivership would have indirectly accomplished, should be upheld, although it was made after the statute under consideration took effect.

UNITED STATES v. RYCKMAN.

(District Court, W. D. Tennessee. April 29, 1882.)

CRIMINAL LAW—WITHHOLDING PENSION—REVISED STATUTES, § 5485.

The section of the Revised Statutes punishing an agent or attorney, or other person instrumental in prosecuting any claim for pension, who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, is not confined to withholding the money actually collected by the agent, but extends likewise to withholding, against the will of the pensioner, the check or treasury warrant coming into his hands, and is intended to protect the pensioner against frauds until the unconditional payment of the money to him. *Held, therefore*, where an agent procured a power of attorney authorizing him to receive the letter containing the treasury warrant, received it from the post-office, assumed to have the authority to indorse it in the name of the pensioner, and passed it by indorsement to a merchant in payment of a small account due by the pensioner to the merchant and in payment of a debt due by the agent himself to the merchant, and took to himself the merchant's due-bill for the balance, that it was an offence against the statute to neglect or refuse to pay the amount due to the pensioner, and this without regard to the authority or the want of authority in the agent to so indorse the check.

Indictment.

The indictment in this case, containing two counts, charged the defendant, as the agent and attorney of one Mary Jane Simmons in the prosecution of her pension claim, with wrongfully withholding from her a certain portion of the pension granted her by the United States. The claim was allowed in February, 1881, and on March 4th, following, the pensioner executed the proper vouchers for the sum of \$333.86, the amount due her, which were forwarded to the paying agency at Knoxville. Afterwards, on the same day, the defendant procured Mrs. Simmons to execute to him a power of attorney to receive from the post-office at Dresden all letters addressed to her concerning her pension, and to sign "all papers, acknowledgments, receipts, and vouchers" necessary to carry into effect the power of attorney; but this instrument did not authorize defendant to indorse the pension check. The defendant then went to a merchant in Dresden, represented that he had the power of attorney, and that it authorized him to indorse the check which would soon arrive, and that Mrs. Simmons desired to purchase goods on credit; the merchant thereupon sold her some \$25 worth of goods, she agreeing to pay for the same out of her pension money when it arrived. The pensioner was an ignorant woman, who could neither read nor write.

Some two or three weeks afterwards the letter containing the check came to the post-office at Dresden, addressed to the pensioner, and having the pension-office stamp printed on the envelope. The defendant, in company with the merchant, went to the post-office, deposited the power of attorney with the postmistress, received the letter, opened it, and indorsed the check as follows:

her
"MARY J. X SIMMONS. Witness: B. F. RYCKMAN, Attorney, Dresden,
mark

Tennessee;" and delivered it to the merchant, who, in payment of the check, credited the pensioner with the \$35 due him from her for the goods sold, and credited the defendant also in the sum of about \$100 owing from him to the merchant, and gave the defendant a small amount in money, and his note or due-bill, payable to defendant, for the balance. The pensioner did not know of the arrival of her check for some weeks afterwards, was not present when it was indorsed, and first ascertained the fact by inquiry at the post-office, when she sent to the defendant for her money, but he never paid her any of it nor went to see her about it. She then, on learning that Mr. Irvine, the merchant, had cashed her check, had an interview with him. On being advised that the power of attorney did not authorize the defendant to indorse the check, Mr. Irvine paid the pensioner the full amount of the check in money, except the \$35 due him from her, and at once notified the pension agency at Knoxville, and the commissioner of pensions at Washington, of the facts, and made several demands upon the defendant for the note or due-bill given him; but the latter refused to surrender it, and it was not in his possession at the trial. On the back of this check was the following notice, printed in red ink: "NOTICE—The payee's indorsement on this check must correspond with signature to the voucher for which the check was given. If the payee cannot write, his or her mark should be *witnessed*, and the witness state his or her residence in full." The check was dated March 8, 1881. It was conceded by the defendant's counsel in argument that if the indorsement by the defendant of the pensioner's name on the check had been duly authorized by the power of attorney, and there were no law making such instruments concerning pensions void, the defendant, under the facts of the case, would be guilty; but it was contended for the defendant that the power of attorney being void in law, and not in terms authorizing the indorsement, the money had been paid by Irvine on a forged indorsement; that his due-bill to the defendant was also void, and that the government was, now-

withstanding, liable to the pensioner for the money; and that as the defendant had received no money for the check, except about five dollars, less than the fee allowed him by law, and Irvine had paid the proceeds of the check to her there had been no withholding, and the court was requested to so instruct the jury.

John B. Clough, Asst. U. S. Atty., for the United States.

Henry W. McCorry, for defendant.

HAMMOND, D. J., (*charging jury*.) The indictment in this case charges a violation of section 5485 of the Revised Statutes, which is as follows:

"Any agent or attorney, or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding \$500, or imprisoned at hard labor not exceeding two years, or both, at the discretion of the court."

The statute, you will perceive, prescribes the punishment for two offences in relation to the prosecution of a claim for pension,—one, the contracting for, demanding etc., of greater compensation for the agent's services than allowed by law; the other, the withholding by the agent of the whole or any part of the pension or claim allowed; and the case under consideration relates only to this latter offence. The plain purpose of all those stringent provisions of the pension laws which the district attorney has read in your hearing is to secure *absolutely* to the pensioner the bounty of the government. It cannot, on any pretext, be lawfully diverted, directly or indirectly, while in transit to his hands. It is not assets for the payment of debts, and can be in no way pledged or impounded for that purpose, and all dealings in that direction are null and void. There is a somewhat analogous policy which protects the salaries of officers of the state and federal governments, and it is generally recognized everywhere. But here congress has, by the most stringent special legislation, sought to protect these pensioners, so munificently endowed, against all possibility of being defrauded by the agents they employ to collect their dues from the government.

Nothing less than the unconditional payment of the full amount, less the small fee allowed, will discharge the agent from the penal-

ties of this statute, whenever, by any contrivance of his, he comes into possession of the warrants or the money they represent. All else is a wrongful withholding under this statute. It is the duty of the courts and juries to so enforce these legislative commands that there shall be no evasion of them.

The words of the statute do not in terms confine the offence to a wrongful withholding of *money* collected on the claim, which would, of course, be a violation of it, but extend to "the whole or any part of the *pension or claim* allowed or due such pensioner or claimant." If the statute is to be restricted to withholding the *money* actually paid by the treasury on the check or warrant of the government to the agent, it would be very much limited in its operation as a protection to the pensioner. The practice of the department under these pension laws is to send the warrant drawn on the treasury direct to the pensioner, to be paid by the treasurer on demand of the holder by proper indorsements, and every effort is made to prevent this warrant from falling into the hands of the agent, who is prohibited from receiving it, and to whom postmasters are forbidden to deliver it by the postal laws and regulations. The offence cannot be restricted to withholding money collected on valid indorsements, and the statute construed to turn loose all who, by forgery or other frauds, succeed in capturing the warrant, notwithstanding these prohibitions, collect the money or obtain its value, and neglect to pay it to the pensioner.

The argument of the defendant's counsel, and the instructions asked for by him, would result in punishing all who withhold the money realized on a pensioner's genuine signature, and in discharging all who obtain and withhold it on his forged signature, because the government, it may be, would remain liable to the pensioner for the amount due, the payment on a forged signature not being in law a payment. This would be a strange result, and I cannot give the instructions asked for.

It was the duty of the defendant to have delivered this check itself to the pensioner, and his failure to do so was a violation of this statute, unless he collected the money on it and paid it to her. Even if the power of attorney operated to authorize the defendant to collect and receive the money, the money itself, when so collected, was under the protection of the statute until paid unconditionally to the pensioner. *U. S. v. Hall*, 98 U. S. 343, 354. If you believe from the evidence that the defendant received the check, passed it to Irvine by

indorsing her name upon it, and received for it any cash or credit or property and Irvine's due-bill or note, and thus appropriated the money to his own use, and that he subsequently neglected or failed, on demand, to pay the amount of the check, or any part of it, to the pensioner, it is your duty to find him guilty under this indictment. The fact that Irvine has seen fit to pay the money to her cannot be a defence to the defendant on the facts of this case. Take the case, gentlemen, and consider your verdict.

Verdict of guilty, and new trial refused.

NOTE. Consult the following decisions on this section, (5485, Rev. St.): *U. S. v. Benecke*, 98 U. S. 447; *U. S. v. Irvine*, Id. 450; *U. S. v. Snow*, 23 Int. Rev. Rec. 78; *U. S. v. Fairchilds*, 1 Abb. 74; *U. S. v. Marks*, 2 Abb. 531; *U. S. v. Chaffee*, 4 Ben. 331; *U. S. v. Howard*, 7 Biss. 56; *U. S. v. Bennett*, 12 Blatchf. 345; *U. S. v. Schindler*, 18 Blatchf. 227; S. C. 10 FED. REP. 547; *U. S. v. Connolly*, 1 FED. REP. 779; *U. S. v. Dowdall*, 8 FED. REP. 881; *U. S. v. Mason*, Id. 412. Compare, also, Sup. Rev. St. pp. 386, 602, and sections 3477, 4745, 2414, 2436, 4747, 5435, 5436, 4783, 5486, Rev. St.

NOTE. See *U. S. v. Hewitt*, 11 FED. REP. 243.

UNITED STATES *v.* WINSTEAD and another.

(District Court, W. D. North Carolina. April Term, 1882.)

1. JUDGMENT—ON FORFEITED RECOGNIZANCE.

A judgment upon a forfeited recognizance of bail is *absolute*, and is not a judgment *nisi*.

2. RECOGNIZANCE—JOINT JUDGMENT—REVIVAL AGAINST REPRESENTATIVES.

Where the judgment on a recognizance was joint as against the principal and sureties, and the principal dies, a *scire facias* will issue to revive the judgment as against the representatives of deceased, and on its return the question of remission of the penalty will be considered.

At the last term of the court W. H. Winstead failed to appear and answer to a criminal prosecution, and judgment was entered against him and his surety on a forfeited recognizance of bail. Upon this judgment a *scire facias* was issued to the parties, to show cause why execution should not be issued. At this term the surety filed a plea stating that the defendant had died before the service of the *scire facias*, and the surety now asks to be discharged from his liability as bail.

James E. Boyd, Dist. Atty., for the United States.

Keogh & Barringer, for defendants.

DICK, D. J. The entry of judgment *nisi* in this case at the last term was irregular. *State v. Smith*, 66 N. C. 420. A judgment *nisi* is one that is to be valid unless something else should be done within a given time to defeat it. When a witness is duly summoned to appear at court and fails to do so, a judgment *nisi* may be entered for the penalty imposed by law for such default; and upon being served with a *scire facias* he may show cause at a future day why the judgment *nisi* shall not be made absolute. If the witness should die before such judgment is made absolute, the proceeding abates and cannot be revived against his personal representative.

A recognizance duly entered into is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. *State v. Mills*, 2 Dev. & Bat. 552.

The recognizance is in the nature of a conditional judgment, and the recorded default makes it absolute, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. The death of a principal, after such default and before the service of a *scire facias*, does not entitle the bail as a matter of right to claim an *exoneretur*.

In criminal cases, where a recognizance of bail is entered into, the surety is considered in law as having the custody of his principal. He cannot commit his principal to prison for safe-keeping, but he may arrest him and deliver him up to an officer of the law at any time before the liability as bail has become fixed by a forfeiture judicially declared on failure to comply with the condition of the recognizance. For the purpose of making an arrest, the bail is invested with all the authority of an officer of the law, except in committing to prison, as he can have no *mittimus* from a committing magistrate. If the principal escapes into another state, the bail may pursue him by obtaining from the clerk of the court a duly-certified copy of the proceedings which show his liability as bail.

After default and an absolute judgment the bail has no power to make an arrest of his principal for the purpose of surrendering him in discharge of a liability fully incurred. The principal is not discharged from his liability for the alleged crime, but he can only be arrested by process from the court. When an arrest has been thus made and the principal has been tried, the court generally, as a matter of favor and indulgence, will remit or modify the liability of the bail.

In some states statute provisions have been made conferring on bail the power of arresting the principal, even after forfeitures, and surrendering him to the court before final judgment on a *scire facias*.

As the judgment in this case was joint, the execution must follow the judgment, and cannot be issued against a dead man's estate until his personal representative has had a day in court. I therefore direct a *scire facias* to be issued to the personal representative of the deceased principal, returnable to next term. When such *scire facias* has been duly served or returned, I will hear evidence and consider the question of remitting or modifying the forfeiture in accordance with the provisions of section 1020 of the Revised Statutes.

UNITED STATES v. STEPHENS.

(Circuit Court, D. Oregon. May 15, 1882.)

1. SPIRITS AND WINE—INTRODUCTION OF INTO ALASKA.

By the act of March 3, 1873, (17 St. 530,) the introduction of spirituous liquors and wine into Alaska is absolutely prohibited, subject to the power of the war department to permit such introduction for the use of the army therein; and, *semble*, that section 2 of the Alaska act of June 27, 1888, (15 St. 240; section 1954, Rev. St.,) which gave the president "power to restrict and regulate or to prohibit the importation and use of * * * distilled spirits" into Alaska, is still so far in force, notwithstanding the passage of said act of March 3, 1873, as to authorize him to permit the introduction of said spirits, but not wine, as a regulation of the subject.

2. ATTEMPT TO INTRODUCE SPIRITUOUS LIQUORS INTO ALASKA.

By section 20 of the act of June 30, 1834, (4 St. 729,) extended over Alaska by the act of March 3, 1873, *supra*, it was made a crime to attempt to introduce spirituous liquors or wine into Alaska. *Held*, that a person resident in Alaska who ordered 100 gallons of whisky to be shipped to him at Alaska, by a wholesale dealer in San Francisco who had the whisky on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish his illegal intent of which the law will take cognizance; the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character.

3. SAME.

Semble, that a criminal attempt to introduce liquor into Alaska cannot be committed unless the act done in pursuance of the illegal intent is performed after the liquor is brought so near some point or place of "the main-land, islands, or waters" of the district as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned.

Information.

Rufus Mallory, for plaintiff.

Cyrus Dolph, for defendant.

DEADY, D. J. On March 30, 1882, an information was filed by the district attorney accusing the defendant, by the first count, of the crime of introducing spirituous liquors into the district of Alaska contrary to law; and by the second count, of the crime of "attempting" to so introduce such liquors into said district. The defendant demurs to the information because it does not state facts sufficient to constitute a crime. Upon the argument of the demurrer it was abandoned as to the first count, and insisted upon as to the second. This count alleges that on July 14, 1879, the defendant, being in the district of Alaska, wrote and transmitted a letter to a certain firm in San Francisco, California, wherein and whereby he requested said firm to ship and send to him at Fort Wrangle, in said district, 100 gallons of whisky; the defendant then well knowing that said firm were then wholesale dealers in spirituous liquors, and owned and possessed said 100 gallons of whisky; "and he thereby contriving and intending to introduce the said 100 gallons of whisky into the said district of Alaska."

In *U. S. v. Savaloff*, 2 Sawy. 311, the district court for this district having decided that the district of Alaska was not "Indian country," and that the act of June 30, 1834, (4 St. 729,) regulating the trade and intercourse with the Indian tribes, was not in force therein, congress, in the general appropriation act of March 3, 1873, (17 St. 530,) amended section 1 of the Alaska act of June 27, 1868, (15 St. 240; section 1954, Rev. St.) so as to extend over that country sections 20 and 21 of said act of June 30, 1834, as well as the acts relating "to customs, commerce, and navigation."

The first of these sections provides, among other things, that "if any person shall introduce or attempt to introduce any spirituous liquors or wine into the Indian country," except supplies for the army under the direction of the war department, he "shall forfeit and pay a sum not exceeding \$300."

By the act of March 3, 1847, (9 St. 203,) said section 20 was amended so that upon a conviction before the proper district court of such act or attempt the party should be punished by imprisonment not exceeding one year. The section was again amended by the acts of February 13, 1862, (12 St. 339,) and March 15, 1864, (13 St. 29; section 2139 Rev. St.) By these latter amendments the maximum punishment for a violation of the section was fixed at two years'

imprisonment and \$300 fine; and jurisdiction was given to the circuit court as well as the district.

By section 2 of the Alaska act, *supra*, (section 1955, Rev. St.,) the president was given "power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and *distilled spirits* into and within the territory of Alaska." It is a question whether this provision, so far as distilled spirits are concerned, was not superseded and repealed by the extension of said section 20 over Alaska by the act of March 3, 1873, *supra*. This section, as has been stated, absolutely prohibits the introduction of spirituous liquors, which of course includes distilled spirits, into Alaska, except for the use of the army, by permission of the war department. Without doubt, as to the executive power to restrict or prohibit, the later act supersedes the earlier one. A statute power in the president to restrict or prohibit is certainly rendered nugatory by a subsequent act which absolutely prohibits. But as to the power "to regulate," which naturally implies the power to permit, the case is not so clear. Probably the better conclusion is that the acts should be construed as *in pari materia*, and both have effect so far as possible. Upon this construction of the statutes the law concerning the introduction of spirituous liquors and wine into Alaska is that such introduction is absolutely prohibited, subject to the power of the war department to permit the same for the use of the army, and the power of the president to permit the introduction of distilled spirits, but not wine, for any purpose.

It is doubtful if any attempt to commit an offence of this character is indictable at common law, and this is probably the reason why it was made so specially by the act defining the crime. 1 Whart. Crim. Law, § 177; 1 Bish. Crim. Law, §§ 684, 687.

It is said that the subject of attempt to commit crime is "less understood by the courts" and "more obscure in the text-books" than any other branch of the criminal law. Bish. Crim. Law, § 657. And certainly there is none in some respects more intricate and difficult of comprehension. It is almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act—an intent to commit a crime and an act done in pursuance of such intent, which falls short of the thing intended.

There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but

are not in a legal sense a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations—conditions, not causes—and, although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions, without which the shooting or poisoning could not take place, but they are not in the eye of the law the cause of either. 1 Whart. Crim. Law, §§ 178, 181; 1 Bish. Crim. Law. § 668 *et seq.*; *People v. Murray*, 14 Cal. 160.

Dr. Wharton says, (*supra*, § 181:) "To make the act an indictable attempt it must be a *cause*, as distinguished from a *condition*; and it must go so far that it would result in the crime unless frustrated by extraneous circumstances."

Bishop says, (*supra*, § 669:)

"It is plain that if a man who has a wicked purpose in his heart does something entirely foreign in its nature from that purpose, he does not commit a criminal attempt to do the thing proposed. On the other hand, if he does what is exactly adapted to accomplish the evil meant, yet proceeds not far enough in the doing for the cognizance of the law, he still escapes punishment. Again, if he does a thing not completely, as the result discloses, adapted to accomplish the wrong, he may under some circumstances be punishable, while under other circumstances he may escape. And the difficulty is not a small one to lay down rules, readily applied, which shall guide the practitioner in respect to the circumstances in which the criminal attempt is sufficient."

In *People v. Murray*, *supra*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage, that he eloped with his niece for that purpose, and requested a third person to get a magistrate to perform the ceremony. Upon an appeal the judgment was reversed. Chief Justice Field, delivering the opinion of the court, said:

"It [the evidence] shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offence charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made; * * * but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt con-

templated by the statute must be manifested by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party."

In the case under consideration, to constitute the attempt charged in the information, there must have been an intent to commit the crime of introducing spirituous liquors into Alaska, combined with an act done in pursuance of such intention, that, apparently, in the usual course of events, would have resulted in such introduction, unless interrupted by extraneous circumstances, but which actually fell short of such result. But it does not appear that anything was done by the defendant towards the commission of the intended crime of introducing spirituous liquors into Alaska but to offer or attempt to purchase the same in San Francisco. The written order sent there by the defendant was, in effect, nothing more or less than an offer by him to purchase the 100 gallons of whisky; and it will simplify the case to regard him as being present at the house of the San Francisco firm at the time his order reached them, seeking to purchase the liquor with the intent of committing the crime of introducing the same into Alaska. But the case made by the information stops here. It does not show that he bought any liquor. Whether he changed his mind and countermanded the order before the delivery of the goods, or whether the firm refused to deal with him, does not appear. Now, an offer to purchase whisky with the intent to ship it to Alaska is, in any view of the matter, a mere act of preparation, of which the law takes no cognizance. As the matter then stood, it was impossible for the defendant to attempt to introduce this liquor into Alaska, because he did not own or control it. It was simply an attempt to purchase—an act harmless and indifferent in itself, whatever the purpose with which it was done. But suppose the defendant had gone further, and actually succeeded in purchasing the liquor, wherein would the case differ from that of the person who bought the gun or poison with intent to commit murder, but did no subsequent act in execution of such purpose? In all essentials they are the same. A purchase of spirituous liquor at San Francisco or Portland, either in person or by written order or application, with intent to commit a crime with the same,—as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska,—is merely a preparatory act, indifferent in its character, of which the law, lacking the omniscience of Deity, cannot take cognizance. At what period of the transaction the shipper of liquor to Alaska is

guilty of an attempt to introduce the same there is not very easily determined. Certainly, the liquor must first be purchased, obtained in some way, and started for its illegal destination. But it is doubtful whether the attempt, or the act necessary to constitute it, can be committed until the liquor is taken so near to some point or place of "the main-land, islands, or waters" of Alaska as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned. But this is a mere suggestion, and each case must be determined upon its own circumstances.

The demurrer is sustained to the second count, and overruled as to the first.

WILSON v. SINGER MANUF'G Co.

(Circuit Court, N. D. Illinois. May 8, 1882.)

1. PENALTY—OFFENCES AGAINST PATENT LAW.

In an action for the penalty for affixing the word "patent" unlawfully on an article, an intention on the part of the defendant to affix a stamp or plate indicating that there was at the time a present subsisting patent upon the machine is necessary, and unless that appears the offence is not committed.

2. PATENTS EXPIRED.

Where the patents marked on the machine issued have all expired, there is no subsisting patent upon the machine or any part of it; and the offence under the statute (Rev. St. § 4901) is not complete.

Walter B. Scates, for plaintiff in error.

William H. King, for defendant.

DRUMMOND, C. J. The last clause of section 4901 of the Revised Statutes declares that "every person who in any manner marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offence to a penalty of not less than \$100, with costs; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed."

The plaintiff in error brought an action in the district court under this statute. The declaration contains three counts, all of which have substantially this statement: That on the first day of Novem-

ber, 1876, and from that time up to the commencement of the suit, the Singer Manufacturing Company did, knowingly, wilfully, and negligently, and contrary to the statute in such case made and provided, and for the purpose of deceiving the public, print, mould, cast, stamp, engrave, mark, and affix upon sliding plates the words or inscription: "Patented September 10, 1846; May 8, 1849; November 13, 1850; August 4, 1851; August 12, 1851; April 11, 1854; May 30, 1854; November 21, 1854; December 19, 1854; May 29, 1855; and October 9, 1855,"—upon each of 100,000 Singer sewing-machines. To this declaration the Singer Manufacturing Company demurred, and the district court sustained the demurrer, and entered final judgment. 12 Chi. Leg. N. 65. Wilson took out a writ of error, and the case is now before this court upon the judgment so rendered, and the question is whether the judgment was correct. I think it was.

The only doubt upon the subject arises from the allegations in the declaration that these plates were affixed in the manner stated for the purpose of deceiving the public. But what is the offence described in the statute, for the commission of which a suit is authorized to be brought? I think it is this, and that it must appear by the allegations of the declaration: an intention on the part of the defendant to affix a stamp or plate indicating that there was at the time a present subsisting patent upon the machine; and unless that appears the offence is not complete. Does that appear on the face of this declaration? I think not. It is not disputed but that these patents existed upon the machine, and were issued in the manner and at the time stated. We have to apply the law to the declaration; and, on being so applied, it follows, as a necessary conclusion, that there were no existing patents upon any part of the machine at the time the plates were affixed. Under the law it appears all the patents thus issued have expired. If the allegations of the declaration did not contradict the fact that there was a subsisting patent, then probably the declaration would be sufficient; as if it had said that the word "patented" was affixed to the machine with the intention of deceiving the public, that might be sufficient without other language; but suppose it had said the defendant had affixed this stamp, viz., "this machine was patented in the year 1840, with the intention of deceiving the public," that would be equivalent to saying that there was a patent issued on the machine which had expired, and therefore there was no existing patent upon it. The same is true of the statement as to patents being issued upon this machine at the dates named.

When we apply the law to the statement, it shows if these patents issued they have all expired; and therefore there is no subsisting patent upon the machine, or any part of it, and the offence is not complete.

The judgment of the district court is affirmed.

UNITED STATES v. VESTAL.

(District Court, W. D. North Carolina. April Term, 1882.)

1. MARSHAL'S SALE—RESALE.

If an officer, at an execution sale, fraudulently refuses to accept the highest bid of a responsible bidder, such bidder may have the sale set aside and a resale ordered, to commence at the amount of his bid, but he cannot be declared the purchaser.

2. SAME—COMPETITION IN BIDS—OFFER TO PAY DEBT.

If the debtor or any other responsible person for the benefit of the debtor, offers at the sale to pay the debt, and the officer of the law accepts such offer, the sale may be stopped, and further competition in bidding is unnecessary, as the purposes of the writ of execution have been accomplished, and the highest bidder thereunder has no rights which can be enforced by the court.

This was a rule on the marshal for the causes and purposes set forth in the opinion of the court.

J. N. Staples, for rule.

J. M. Moring, for marshal.

DICK, D. J. I find the following facts from the affidavits filed: The deputy marshal had duly levied the execution on the lands of the defendant, and on the ——— day of ———, 1882, offered the same at public auction to satisfy said execution. The biddings were continued for some time, and the affiant Taylor Teague was the last and highest bidder. While the deputy marshal was crying the bid of Teague, the father of the defendant offered to pay off the execution and costs for his son. This proposition was accepted by the deputy marshal and the sale was discontinued.

I am of the opinion that Teague acquired no rights by his last and highest bid which can be enforced by the court as the bid was not accepted by the auctioneer. A bid at an auction is but an offer to purchase, and may be withdrawn before it is accepted. To constitute a contract of sale the agreement must be mutually binding upon the parties. As Teague's last and highest bid was not accepted he was not bound by it, and no contract of sale was effected. If an

officer at an execution sale fraudulently refuses to accept the highest bid of a responsible person and accepts a lower bid, the highest bidder can, by an application to the court from which the execution issued, have such sale set aside and a resale ordered, to commence at the amount of his bid; but the court cannot declare him to be the purchaser.

The deputy marshal was a public officer acting in obedience to an execution commanding him in the name of the United States to cause to be made of the property of the delinquent debtor a sum of money judicially ascertained to be due the plaintiff in the execution. The levy made by the officer on the lands of the debtor divested neither the possession nor the estate of the debtor, but merely conferred a power of sale for the purposes designated in the execution. In offering the land for sale the officer was acting as a minister of the law, in obedience to its mandate, and could not rightfully exceed his power. That mandate required him to make the sum of money mentioned in the execution, and sell the property of the debtor for that purpose, if a sale became necessary. In making a sale under execution an officer is in some respects the agent of the debtor, and as such agent it is his duty to make a sale in such a manner as not to sacrifice unnecessarily the property of the debtor, as the law accords to him all the chances of a fair sale and a full price. Every debtor has a right, at any time before the sale is completed, to prevent a sale by the payment of the money mentioned in the execution to the officer. In this case a satisfactory proposition of payment was made to the officer by the father of the defendant, and at his request, and the same was accepted and the offer of sale was withdrawn.

It was insisted in the argument that the policy of the law in requiring execution sales to be made at public auction to the highest bidder is to encourage competition, and that it will not tolerate any conduct of the officer or any other influence which is calculated to discourage or prevent such fair competition among bidders. This general proposition is correct; but the object of competition among bidders is to secure a fair price for the property, for the benefit of the parties interested in the sale. After a sufficient sum has been obtained to secure the debt of the plaintiff, the debtor is the only one who can be benefited by a higher bid. If he offers to pay the debt of the plaintiff and the officer of the law accepts such offer, there is no necessity for the encouragement of further competition, and the sale may be stopped, as the purposes of the writ of execution

have been accomplished and the debtor does not desire to part with his property. In this case the affiant Teague has in no way been damaged, and the execution has been satisfied without the sale of the lands of the defendant. If there had been a sale to a lower bidder and the officer had acted fraudulently or irregularly, we have already stated what would have been the right and remedy of the highest bidder. There is inherent in every court a power to supervise the conduct of its officers and the execution of its judgments and processes. The court can set aside a sale and order a resale, but cannot declare a bidder to be a purchaser—the contract of sale must be made by its ministerial officer.

As the execution in this case has been returned *satisfied* and the money has been paid into court, I decline to grant the prayer contained in the affidavit of Teague, and the rule heretofore granted is discharged, without costs to either party.

PACIFIC GUANO Co. v. HOLLEMAN.*

(Circuit Court, S. D. Georgia, W. D. May 15, 1882.)

1. PROMISSORY NOTE MADE TO AGENT.

A corporation may sue on a promissory note payable to the order of its agent by name, and describing him as "agt.," and not indorsed by the agent.

2. SAME—PAROL EVIDENCE OF OWNERSHIP.

Parol evidence is admissible to show that the corporation, suing as plaintiff, is the owner of the note.

Action at Law, upon the following note:

"\$419.30.

BYRON, GEORGIA, April 23, 1875.

"On the twentieth of October, after date, I promise to pay to the order of Asher Ayres, agt., \$419.30, to T. B. Goff, or at his office in Macon, Georgia; value received. If not paid at maturity, to bear interest at the rate of 12 per cent. discount per annum.

D. H. HOLLEMAN." [L. S.]

Defendant demurred to the petition, which set out a copy of the note, and which alleged that the defendant gave the same to Asher Ayres, agent of the plaintiff. Defendant also filed a plea, in the form of a plea to the jurisdiction, denying that the Pacific Guano Company had the legal title to the note, and alleging that the same

*Reported by W. B. Hill, Esq., of the Macon bar.

was in Asher Ayers, the agent, a resident of the district in which the suit was brought. The issues thus raised were submitted to the court upon the following agreed statements of facts:

[After stating the case.]

"At the April term, 1882, of the court, the pleas to the jurisdiction (along with a demurrer to the plaintiff's writ) were submitted to the circuit and district judge, a jury being waived by consent of the parties, upon the following admitted facts: Asher Ayers, the agent named in the note sued on, (and set out in the plaintiff's petition,) is a resident of said western division of the southern district of Georgia. The Pacific Guano Company is a corporation having its legal domicile in the state of Massachusetts, and was the holder of the note sued on at the time of the commencement of the suit. The question argued was whether the plaintiff can maintain the action on the note, and whether parol evidence is admissible to show that the note is in fact the property of the plaintiff. (Plea of failure of consideration reserved for trial before jury.)"

Hill & Harris, for plaintiff.

H. M. Holtzclam, for defendant.

PARDEE, C. J. The agreement of counsel submits to the court two questions: (1) Whether, on the agreed state of facts, the plaintiff can maintain the action. (2) Whether parol evidence is admissible on the trial to show that the note is in fact the property of the plaintiff. The facts agreed on are that Ayres, the agent named in the note, is a resident of this district, and the plaintiff is the holder of the note sued on, and is a corporation domiciled in the state of Massachusetts. The other facts appear in the petition. We are agreed that both questions shall be answered in the affirmative. That a note given to Asher Ayres, agent, may be sued on by the principal, who is the owner and holder, is well settled by all the later authorities. See 12 Am. Dec. 713, 715, and authorities there cited; *Daniell*, Neg. Inst. § 1187; *Baldwin v. Bank of Newbury*, 1 Wall. 234.

The authority cited by counsel for defendant in 1 Addison on Contracts, § 51, does not apply, as that section relates to equities between the parties in cases of concealed agency.

The case of *Austell v. Rice*, 5 Ga. 472, does not conflict, for the court in that case did not deny the right of the principal to bring the suit, but maintained the right of the payee named also to sue. To the same effect is the extract from the decision of Chief Justice Marshall in *Van Ness v. Forrest*, 8 Cranch, 30, for the point in that case was whether the payee named could sue, and his right was maintained. The admissibility of parol evidence to show that the plain-

tiff is the real owner and holder of the note sued on, when such ownership is put at issue by the defendant, is elementary. And in principle and authority the plaintiff may offer such evidence when in cases like this under consideration it may be held necessary for him to make such proof in order to maintain his action. See Daniell, Neg. Inst. § 1187, and cases there cited.

ERSKINE, D. J., concurred.

MERCHANTS' INTERNATIONAL STEAM-BOAT LINE v. LYON.

(Circuit Court, D. Minnesota. May, 1882.)

1. PLEADING—FORMER JUDGMENT AS AN ESTOPPEL.

Where a judgment of record in a former suit is pleaded as an estoppel, which does not on its face show that the verdict was rendered upon the same issues as those in the suit on which it is pleaded, evidence *aliunde* is required to prove that the precise point involved was submitted to the jury.

2. SAME—FORMER JUDGMENT AS A BAR—PROOF ALIUNDE.

Where the answer of the defendant sets up the same defence as the answer in the former suit, admissions by counsel, in connection with the offer of the record as evidence, that testimony upon both defences of the former action was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in the present suit was litigated and determined in the former suit.

This suit is brought upon three promissory notes, aggregating the sum of \$2,300. The defendant is the maker, and they were made payable to the order of A. G. B. Bannatyne, and by him indorsed and delivered to the plaintiff. Before the commencement of this suit the State National Bank of Minneapolis brought an action upon these promissory notes, claiming to be holder and owner thereof, which was tried in this court, and a verdict rendered for defendant and judgment entered. The judgment record is pleaded in the defendant's answer as a bar to a recovery by the plaintiff. The answer in the former case of *Bank v. Lyon* sets up two defences, one of which was that the notes were given without consideration, and testimony was offered and submitted to the jury tending to support both defences, and a general verdict was found for the defendant. The answer of the defendant in the present action sets up the same defences presented by the answer in the former suit, including the one alleging that the notes were given without consideration; and for a further defence sets up the verdict and judgment obtained

in the former suit as a bar to a recovery by this plaintiff. After the plaintiff had offered on the trial the notes in evidence, it rested, whereupon the plaintiff admitted that testimony was offered and submitted to the jury in the former suit tending to support both defences set up in the answer, and the defendant offered in evidence the judgment record in that suit, which was admitted under the objection of the plaintiff. The defendant offered no further evidence, but asked the court to charge the jury that the former suit and judgment, and the record thereof, was a bar to the present suit, and that the defendant was entitled to a verdict in his favor. The court charged the jury that as the case stood the said former suit was a bar to a recovery by the plaintiff in this action, and that the jury must find a verdict for the defendant, and under the charge and instructions the jury so found a verdict. Motion is made for a new trial.

Bigelow, Flandrau & Squires, for plaintiff.

C. K. Davis and *R. B. Galusha*, for defendant.

NELSON, D. J. The plaintiff asserts that the court erred in laying down the proposition that where two defences are set up in an answer, and evidence is submitted to a jury upon a trial of the action tending to support both defences, and a general verdict rendered for defendant, such verdict and judgment is a bar in another action upon the same demand.

The plaintiff's counsel has cited many cases in his brief to sustain the proposition that the general verdict, and judgment which followed, was not a bar; but an examination of them shows that in nearly all the judgment alone, without explanatory evidence, or any admission as to what the facts litigated were, was offered and claimed to be of itself an estoppel.

If the offer of the record in evidence in the former action had not been accompanied by the admission that testimony was submitted to sustain both defences, or evidence *aliunde* given tending to prove that fact, these authorities might be applicable. In this case the presumption is that the jury passed upon all the issues made in the former action, and that they considered the evidence introduced relative to both defences, and the record is conclusive.

It is impossible to show *aliunde* that the verdict was found upon one and not both defences without inquiring into the secret deliberations of the jury, which is not admissible. It is only necessary for the defendant, who relies upon the record in a former action as a bar, to go into evidence *aliunde* to prove such a particular question was actually controverted and submitted to the jury, and that the verdict

was such as to show that they passed upon it, when such fact does not appear upon the face of the record. This evidence was supplied by the admission of the plaintiff on the trial, and made the estoppel effectual.

The case of *Russell v. Place*, 94 U. S. 606, is cited by the plaintiff's counsel as settling in his favor the legal effect of the record in the former suit. I do not so understand the opinion. In that case a bill was filed to recover for the infringement of a patent. The complaint sets forth the invention and the issue of the patent, and a recovery of a judgment for damages against the defendants, in an action at law for a violation of the patentee's rights, and alleges the infringement of the patent by defendants, and asks for a decree. The answer sets up as a defence the want of novelty in the invention, and admits the recovery by the complainant in the action at law of the judgment set up, but denies that the same issues were involved or tried in that action which are raised here. The action at law was in the usual form of such actions for infringement of secured privileges. The defendants pleaded the general issue, and set up by special notice, under the act of congress, the want of novelty in the invention. The plaintiff obtained a verdict for damages, upon which the judgment mentioned in the bill filed was entered, and which it is claimed estops the defendants from insisting upon the want of novelty in the invention. No extrinsic evidence was offered to show that testimony was submitted to the jury upon the question of the novelty of the invention in the action at law, but the record alone was relied upon, which did not show it, as a bar to the defence of want of novelty.

The court announced the rule which had on many previous occasions been followed, to-wit: That a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to give this effect to the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Applying the rule thus announced, it appears that the judgment record in the former action, pleaded as an estoppel in this suit, did not, upon its face, show that the verdict was rendered upon the same issue now tendered and to make the record operate as an estoppel evidence *aliunde* was necessary to prove that the precise point involved was submitted to the jury. The admission by counsel, in connection with the offer of the record as evidence, that testimony upon

both defences was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in this suit was litigated and determined in the former action.

It is true, the plaintiff in this action was not a party to the former suit, but his privity with the plaintiff in the former action is not doubtful. Both plaintiffs claimed through Bannatyne, the payee and first indorser.

Motion for new trial denied.

McCrary, C. J., concurs.

BOATMEN'S SAVINGS BANK *v.* WAGENSPACK.*

(Circuit Court, E. D. Louisiana. April, 1882.)

1. EXECUTORY PROCESS UNDER ARTICLES 732 TO 753 OF THE LOUISIANA CODE OF PRACTICE.

An order of seizure and sale, unless there is opposition, is a final order; if there is opposition, it is a mere process introductory to a litigation.

Peters v. Fitzgerald, 15 Pet. 167, followed.

2. SAME—ORDER OF SEIZURE AND SALE.

When the issue is made up by the opposition, the order of seizure and sale, though first in the point of time, becomes merely an incident in the cause, and when the cause is transferred to the circuit court the order comes as a part of it, under section 4 of the act of March 3, 1875, (18 St. 471,) and there the practice in equity governs.

Marin v. Lalley, 17 Wall. 14, followed.

David N. Barrow and George L. Bright, for complainants.

J. R. Beckwith, for defendant.

BILLINGS, D. J. This cause is submitted on a rule to show cause why the order for executory process should not be set aside as having been granted upon insufficient evidence.

An order of seizure and sale had been issued in one of the state courts. An opposition had been filed and an injunction obtained, when the cause was, upon the petition of the mortgagor, removed to this court, where he has taken this rule.

It is objected (1) that this is a motion for a new trial of a matter tried and adjudged in the state court, or an effort to enjoin a cause or proceeding pending or undecided in a state court. The sufficiency of this objection depends upon whether the order of seizure and sale has been transferred to this court, or now remains as a decree in the

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

state court. It is objected (2) that the order for seizure and sale cannot be reviewed upon an order to show cause, but only upon an appeal. The conclusiveness of this objection, as well as that of the first, must depend upon the nature and character of this order under our law, and therefore I shall consider both objections together. The record shows the petition for an executory process; a conditional order for such a process, *i. e.*, an order that there be a seizure and sale, after due demand, the lapse of three days, a writ of seizure and sale, the filing of an opposition and an injunction granted restraining the Boatmen's Savings Bank from further proceeding by executory process with the execution of the order of seizure and sale issued in the above-entitled cause, or from seizing the mortgaged property; a responsive pleading, termed a peremptory exception, filed by the party who claims as mortgagee; and lastly a petition in a cause entitled Boatmen's Savings Bank to the mortgagor, by the mortgagor, for a removal, and an order in a cause similarly entitled that "this cause be removed."

There had been a conditional order of sale, an injunction of that order, an exception, and a transfer of the cause. It is the cause which is transferred. What is the cause? The C. P., arts. 732 to 753, inclusive, gives this right to executory process, and the manner in which it may be judicially resisted and finally arrested. The mortgage creditor may seize, the mortgagor may oppose and enjoin, and thus the issue is made. That issue is as to the right of the mortgagee to have the summary process, and that issue constitutes the cause or controversy. If the judgment is in favor of the mortgagee the seizure and sale are enforced. If in favor of the mortgagor, they are perpetually enjoined. The cause or controversy includes all the proceedings incidental to its decision. Jurisdiction is obtained, and can be operative only by control over the seizure. The removal of the cause, therefore, brings all orders issued therein. The order of seizure and sale, unless there is opposition, is a final order; if there is opposition, it is a mere process introductory to a litigation. This view is distinctly announced by the supreme court of the United States in *Levy v. Fitzpatrick*, 15 Pet. 167. This is also the view of the supreme court of this state as to the nature and function of this proceeding. In *Hurrod v. Voorhies*, 16 La. 256, the court says:

"But such a decree is not a judgment, in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides on no issue made up between the parties, nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial

contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside. After rendering this decree he would be divested of all jurisdiction, and it could be reversed only by means of an appeal, or a separate action of nullity; whereas it is every-day practice for the judge issuing such orders to set them aside on an order to show cause or an opposition; and in most cases the proceedings are turned into an ordinary suit, in which a final judgment is afterwards rendered. Such a decree, then, can be viewed only as giving the aid of the officers of justice to execute an obligation, which by law produces the effects of a judgment in relation to the particular mortgaged property."

These orders are issued in France by notaries, who are there *quasi* judicial officers.

The order for executory process is in form a decree or judgment, but it is in substance only an order *ex parte*, founded on the consent of an absent defendant, and only a proceeding *in rem*; for no judgment can be given against the mortgagor for any deficiency. When the issue is made up by the opposition, this order, though first in time, becomes merely an incident to a cause. When the cause is transferred to the circuit court, this order comes as a part of it. Section 4 of the act of March 3, 1875, provides that "all orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." That is, they become the orders of the circuit court.

It is urged that the decision of *Barrow v. Hunton*, 99 U. S. 82, is in point. But the distinction is that there was a final judgment, the definitive character of which was absolute, and the question was whether any other court could by its decree operate upon it to annul it. Here is no judgment, provided there is an opposition, but only an order which initiates a judicial controversy, and the maintenance of which depends upon the result of that controversy.

There is no doubt but that, as is contended by the solicitors for the mortgagor, it is well settled now by the supreme court of the state that the order for executory process can be reviewed only by appeal. See *City of Shreveport v. Flournoy*, 26 La. Ann. 709; *Heft v. Kelty*, 17 La. Ann. 143; *Naughton v. Dinkgrave*, 25 La. Ann. 538. But this result has been reached merely as a rule of practice and not from the intrinsic nature of the proceeding, and as a rule of practice it ceases to have any force when the cause is transferred to the equity side of the United States circuit court; there the practice in equity governs. By that practice even a final decree may be set aside at any time during the term at which it is rendered. *A fortiori*, a pro-

visional interlocutory order may be so set aside. That such a cause pending in the circuit court is to be dealt with as a cause in equity, is decided in *Marin v. Lalley*, 17 Wall. 14.

Now, as to the manner in which this matter of the insufficiency or incompetency of the authentic proof can be passed upon. It seems to me that that is the entire controversy, and that it must be passed upon by the court by a final decree, otherwise the chief and in this case the only question in the case would be decided by an interlocutory order, without any termination of the cause, and in case the decision should be in favor of dissolving the order, would leave the mortgagee without opportunity to continue his seizure by a suspensive appeal, which, in justice, he ought to be placed in a position to have, and would deprive him of the right to elect to turn his proceedings into a suit for foreclosure *via ordinaria*.

The rule is, therefore, discharged, as presenting a matter which must be considered upon a final hearing, when a decree can be rendered which will dispose of the case.

In re BROCKWAY, Bankrupt.

(District Court, S. D. New York. April 28, 1882.)

1. PRACTICE—ADMISSION OF EVIDENCE ON FORMER TRIAL—BANKRUPTCY.

The rules in regard to the reception of evidence taken upon a former trial are applicable to proceedings in bankruptcy upon two successive and independent petitions for a discharge, in reference to similar objections made by the same creditors. Both petitions, though independent, are parts of one bankruptcy proceeding.

2. BANKRUPTCY—SUCCESSIVE APPLICATIONS FOR DISCHARGE.

The first petition by a bankrupt for his discharge having been denied, but not upon the merits, *held*, that upon a subsequent application and a hearing before the register thereon, upon the same objections first filed, that the testimony of a witness taken on the hearing under the first petition was competent evidence on the second proceeding, the witness having in the mean time died. *Held, also*, that the former testimony of another witness, whose death was not shown, nor his absence from the jurisdiction of the court certain, was not competent.

3. DISCHARGE, WHEN DENIED.

The bankrupt having been engaged in the business of a brewer, and not having kept any cash-book or invoice-book or stock-book, and from such books as were kept it being impossible, even with the aid of any explanations which the bankrupt could or would give, to ascertain or explain satisfactorily the course, situation, or pecuniary result of his business, *held*, that the discharge must be denied.

Application for Discharge.

On January 21, 1871, Brockway was adjudicated a bankrupt on his own petition. On April 22, 1872, he filed a petition for a discharge from his debts, to which specifications of objections were filed, stating, among other things, that he had not kept proper books of account, with the requisite specification of particulars. After evidence taken upon these and other specifications before the register upon the merits, the application was brought to a hearing in this court on October 30, 1875, when the application was denied by *Blatchford, J.*, on the sole ground that the application for a discharge had not been made within one year from the adjudication of bankruptcy, as required by the law then existing. Upon that proceeding before the register the books of the bankrupt were produced, and the evidence of two witnesses, Gordon and Speir, was taken in regard to them and their contents. Prior to the first application for a discharge the books, with other assets, had been sold under the order of the court, and purchased by one Leach, a sailor, without family, and a brother-in-law of the bankrupt. On April 21, 1879, the bankrupt filed his present renewed application for a discharge under the provisions of the law as amended. The same opposing creditor filed specifications of objections embracing the same objections in regard to the want of keeping proper books of account as before. The former testimony of Gordon and Speir, upon the previous application for a discharge, not being found on file, a stipulation was entered into between the parties that certain copies should stand in place of the originals; and evidence was also given that the books which had been produced upon the former hearing could not be found. The former testimony of Gordon and Speir was thereupon offered in evidence by the opposing creditor, under the stipulation, which was objected to by the bankrupt on the ground that the original, if produced, would not be competent upon this independent proceeding for a discharge. Numerous other objections were made to the discharge not considered by the court.

M. H. Regensburger, for bankrupt.

Beach & Brown, for opposing creditor.

BROWN, D.J. The issue raised by the specifications, so far as respects not keeping proper books of account, is the same as in the previous application for a discharge. The parties to the issue are also the same, and the proceeding for a discharge is in the same bankruptcy. The evidence of witnesses on the former trial of the same issue is therefore competent evidence upon this hearing, on proof that the witnesses are either dead or out of the jurisdiction. 4 Wall. 222; 12 How.

(U. S.) 576; 7 Pet. 272. An application for a discharge is a part of and continuation of one proceeding in bankruptcy commenced by the original petition. *In re Ankrim*, 3 McLean, 285, 289; *In re Farrell*, 5 N. B. R. 125.

Sufficient proof was given upon the present hearing before the register of the death or absence of Gordon to make his former testimony competent under the rule; and the stipulation given in this case makes the copy produced equivalent to the original testimony, which ought to have been on file under the former proceeding for a discharge. The testimony is not sufficient to show either the death of Speir or his absence beyond the jurisdiction of the court; and I do not, therefore, consider his former deposition. Sufficient evidence was given of the inability of the opposing creditor to produce the books (which I cannot doubt were practically under the control of the bankrupt after the purchase of them by the seaman, Leach, his brother-in-law) to admit secondary evidence. The testimony of Gordon on the former hearing being thus admissible upon this hearing, I am satisfied, upon examination, that it shows such a failure to keep proper books of account as should bar the bankrupt's discharge. There was no proper cash-book, nor proper stock-book; and Gordon, one of the assignees, a competent man, could not make out from them either the course, situation, or pecuniary result of the business; and, upon application to the bankrupt, he either could not, or would not, make explanation. More than half of the bankrupt's indebtedness proved consists of three items alleged to be owed to his wife, his brother, and his son; all alleged to be for debts connected with his business, and nowhere appearing on the books, as Gordon testifies. The books could not be balanced, and, in brief, they utterly failed to furnish any satisfactory account of the course and result of his business, such as is necessary to entitle a bankrupt to his discharge. Section 5110, subd. 7; *In re Frey*, 9 FED. REP. 376, 384.

On this ground the application should be denied.

In re BAXTER, Bankrupt.*(District Court, S. D. New York. April 8, 1882.)*

1. BANKRUPTCY—PROOFS OF DEBTS—AMENDED PROOFS.

Proofs of debt, made under a mistake of fact or law, may be amended or withdrawn, if no action has been based upon such proofs which cannot be recalled or compensated.

2. SAME—MISTAKES—WITHDRAWAL OF PROOFS—INDEMNITY.

Where proofs of debt were made by B. B. & Co. upon two bills of exchange, drawn upon London, against consignments of merchandise, unaccompanied by a transfer of the bill of lading, and the branch house of B. B. & Co., in London, at the time of such proof, claimed a lien upon the proceeds of the merchandise there as security for the bills, which was disputed and in litigation between various claimants upon the fund, including the trustee of the bankrupt's estate, and the facts were known to the creditor here, who verified the proofs of debt, and supposed that the facts were also known to his attorney here, to whom the preparation of the proofs was entrusted, but who was ignorant thereof and accordingly prepared the proofs as unsecured claims, *held*, that the case was one of mistake of mixed fact and law, and the creditors had leave to withdraw their proofs upon terms of indemnity to the estate. *Held*, also, that the mere receipt of dividends upon such proofs is no obstacle to the withdrawal or amendment of the proofs, as the dividends may be returned, with interest.

3. SAME—WITHDRAWAL OF PROOFS, WHEN ALLOWED—RETURN OF DIVIDEND.

But where the trustee of a bankrupt was defending in England against a claim made by creditors upon a certain fund as security for their demands, upon the ground that they were estopped by having proved their claims here as unsecured, and also defended upon the merits, denying the creditors' alleged lien upon the fund, *held*, that the creditors' withdrawal of proofs should be allowed only upon the return of dividends, with interest, the payment of the costs of this application, and of all the costs and counsel fees in the litigation in England, if the trustee elected to abandon the further defence of the case there, or, if not, then upon payment of the trustee's costs up to this time.

Petition for Leave to Withdraw Proofs.

W. W. McFarland, for petitioners.

Abbott Brothers, for trustee.

BROWN, D. J. This is a petition by Brown Bros. & Co. for leave to withdraw their proofs of debt heretofore made upon two bills of exchange drawn by Archibald Baxter & Co. upon Jones Bros., of London, at 60 days' sight,—the one dated August 5, 1875, for £2,500, payable to the order of Brown, Shipley & Co.; the other dated August 6, 1875, for £1,000, payable to the same payees,—which were drawn against the "account of cheese per Britannic, and lard per Greece;" which bills had been purchased by the petitioners on the day of their date. On the seventh day of August, 1875, Baxter & Co. failed, and made an assignment of their property in trust for their creditors.

In November following a petition in bankruptcy was filed against them in this court, on which an adjudication in bankruptcy was had on December 24, 1875. On the twenty-eighth day of March, 1876, a trustee was appointed by the creditors for closing up the bankrupts' estate. On August 3, 1877, the petitioners filed proofs of debt against the bankrupts upon six bills of exchange, as unsecured demands amounting altogether to the sum of \$56,239.87, including the two bills first above mentioned. On the third day of November, 1877, they received a dividend of 5 per cent., and on the tenth of February, 1879, a further dividend of 3 per cent., on the amount proved. They now ask leave to withdraw their proofs in respect to the two bills above mentioned, upon restoring the dividends received thereon, with interest, upon the ground stated in their petition. This is opposed by the trustee in behalf of the creditors. The two bills in question had been purchased by the petitioners upon the faith of the security of cheese and lard forwarded, or to be forwarded, by Baxter & Co. to Jones Bros. by the steamers *Britannic* and *Greece*, as referred to in the bills. The bills of lading were not attached to the drafts; and such had previously been their usual course of dealing. Immediately upon the failure of Baxter & Co. the petitioners employed their attorney to examine into the law and the facts in regard to the situation of their claims and their security under the bills; and were advised that where the goods referred to in the bills of exchange had been actually forwarded, the bills would constitute a lien upon the goods or their proceeds.

The result of the examination into the facts by their attorney at that time led to the belief on his part that while certain goods represented by other bills of exchange had been forwarded, the goods represented by the two bills in question had not been forwarded. This was in fact a mistake, which the petitioners, through the English branch of their house, Brown, Shipley & Co., afterwards learned in due course of mail; but their attorney here was not apprised of his mistake nor was his misapprehension corrected. In 1877, accordingly, when the same attorney prepared the proofs of debt, these two bills were included with the others, and all were thus proved as unsecured, upon the supposition and belief on his part that the goods had not gone forward, and that there was no claim to security upon them; while certain other bills, upon which the attorney understood that the goods had been forwarded, were not included among the claims then proved. The petitioners, on the other hand, supposed that their attorney had been apprised of the fact that all the goods had been forwarded

to the drawee, and that the proofs were drawn in accordance with, and saving to them, all their legal rights. The error was not discovered until a few months since, when, in a suit in the High Court of justice, Chancery Division, in England, by Brown, Shipley & Co., plaintiffs, against the drawee and the trustee of the bankrupts, whereby the plaintiffs sought to assert their lien upon the proceeds of the goods, the trustee interposed as one of his defences the proofs of the drafts in this court as unsecured claims as a waiver or forfeiture of any lien upon the goods. The delay in the commencement of this last suit had been caused through previous litigation in England in the same court, wherein Dennistown, Wood & Co. had, shortly after the arrival of the goods in England in 1875, asserted a claim upon the goods or their proceeds in their favor. The trustee, as well as Brown, Shipley & Co., were defendants in that suit. The latter, in their answer, had asserted their priority of lien, but without claiming specific relief in that suit. Final decree against Dennistown, Wood & Co.'s claim was not rendered until July, 1881; whereupon, within a few days thereafter, the suit first mentioned was commenced by Brown, Shipley & Co. The trustee in this last suit defends, not merely upon the ground that the petitioners are precluded from recovery in consequence of their proof of the drafts in 1877 as unsecured debts, but also upon the merits, contending that upon the facts the petitioners are not entitled to either a legal or an equitable lien.

Without specifying further the details of the matters referred to in the present petition, and in the answering affidavits on the part of the trustee, I am satisfied that the proof of debt made by the petitioners in 1877, so far as it embraces the two bills of exchange above mentioned, was the result of a mutual misunderstanding between the petitioners and their attorney; that, on the part of the latter, to whom the preparation of the proofs had been entrusted, it was purely a mistake of fact, and that although the proofs were submitted to and verified by one of the petitioners who did know the facts in regard to the forwarding of the goods, yet that he was mistaken also in supposing that his attorney had knowledge of the facts, and that the proofs were properly drawn in reference to those facts, so as to save to them their legal rights then in litigation in England. The security claimed by way of the alleged lien is of a peculiar character, and, as the trustee even now contends, altogether novel and without any legal foundation. But that neither the petitioners nor their attorney ever contemplated waiving their claim, or doing

any act to prejudice it, is, I think, clearly substantiated, not merely by the claims of the petitioners in the litigation in England, which has been all the time going on, but especially, also, from the fact that two other bills of exchange for about the same amounts, as to which the attorney knew the goods had been forwarded, were omitted from the proofs, and have never been presented in bankruptcy at all, although the claim to a lien on the goods as to those bills was attended by additional litigation here, growing out of the assertion of title to the goods by the original vendors of Baxter & Co. The proofs, therefore, must be regarded as being made under a pure mistake of fact on the part of the attorney who prepared them, and mistake of mixed law and fact on the part of the petitioners. In such cases it has been the practice in courts of bankruptcy in this country to permit the error to be corrected when the estate has not been injuriously affected, or when any action based thereupon can be recalled or compensated.

In the case of *Clark & Bininger*, in this court, (5 N. B. R. 255,) proofs were allowed to be amended under circumstances somewhat similar.

In the case of *Edward Hubbard, Jr.*, 1 Low. 190, (1 N. B. R. 679,) *Lowell J.*, says:

"When proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. And even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal if there had been a mistake and no want of diligence."

In the case of *John F. Parkes*, 10 N. B. R. 82, *Longyear, J.*, says:

"The court undoubtedly possesses the power, in its discretion, to allow proofs of debt to be amended, and in cases of mistake or ignorance, whether of fact or of law, will generally exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in if the error had not occurred, and where justice seems to demand that it should be done." *In re Brand*, 3 N. B. R. 324; *In re Jaycox*, 8 N. B. R. 277; *Ex parte Harwood*, Crabbe, 496; *Edwards v. Morgan*, McClell. 551.

But where a creditor, by proof of his debt, has taken part in the meetings of creditors, and controlled the action of others in the choice of an assignee or trustee, or influenced the question of the bankrupt's discharge, he is held precluded from any subsequent change in his proofs. *New Bedford, etc., v. Fair Haven, etc.*, 9 Allen, 175, 180; *Ex parte Solomon*, 1 Glyn & J. 25; *Stewart v. Isidor*, 1 N. B. R. 485; *In re Bloss*, 4 N. B. R. 147.

Where in other respects a creditor would be held entitled to amend his proofs, the mere prior receipt of dividends is no objection, as they can be restored to the assignee or trustee. Such was the case in the case of *In re Parkes*, above cited; and in England, in cases of double bankruptcy, or proof against joint and several estates, amendments are frequently allowed on terms of repayment of dividends already received. *Ex parte Cobbett*, 1 Atk. 218; *Ex parte Bolton*, 2 Rose, 389; *Ex parte Bielby*, 13 Ves. 70; *Ex parte Waring*, 19 Ves. 345; (see the decree in that case quoted in full in *Powles v. Hargreaves*, 3 De Gex, Mac. & G. 445;) *In re Barnard's Banking Co.* L. R. 10 Ch. App. 198, 201; 5 H. L. 157; *City Bank v. Luckie*, L. R. 5 Ch. App. 773, 778; *Ex parte Morris*, 16 N. B. R. 572.

It is urged on the part of the trustee that, during the pendency of the prior litigation in England in the suit of Dennistown, Wood & Co., certain overtures by them were made towards a settlement, and pecuniary offers made to the trustee in case he would withdraw his defence, by which he might have realized something for the estate, but which were rejected by him on the faith of the supposed waiver of their claim by the petitioners under their proofs of debt. This suggestion is at the most but a mere possibility of some loss to the estate, without sufficient probability to entitle it to consideration. No actual offer is stated to have been made; and, as the assertion of a superior claim by Brown, Shipley & Co. had been interposed in that suit, it is hardly credible that any final settlement by Dennistown, Wood & Co., or any payment of money by them, would have been made that did not involve the surrender of the claim of Brown, Shipley & Co.; and there is no reason to suppose that such a surrender would have been made. The negotiation would, therefore, have amounted to nothing.

The proof of debt in this case has never been used as a means for taking part in any meetings of creditors, nor of influencing any of the proceedings in bankruptcy; nor since the discovery of the error in the proofs, but a few months since, has there been any such laches as should preclude amendment.

In being allowed to amend the proofs, however, by withdrawing the two bills in question, the petitioners will remove a valid defence which the trustee now has against their claim in a pending suit in England. Whatever the trustee's other grounds of defence may be, he had a right to rely upon this as, at all events, a valid one; and he has duly interposed it by answer in that suit. It was his duty

also to present such objections as were available in opposition to the present petition.

The amendments are, therefore, allowed only upon the terms of restoring the dividends on the two bills in question heretofore received, with interest thereon, and the payment of \$50 counsel fees and charges of the trustee upon this application, and also upon payment of the costs and counsel fees of the trustee in the suit of Brown, Shipley & Co., commenced in July, 1881, up to this time, in case the trustee shall elect to abandon the further defence of that action; and, if he shall not so elect, then upon a stipulation of Brown, Shipley & Co. that in case of their success in said suit they shall have no costs therein up to this time, but shall pay the trustee's costs up to this date.

MEHRBACH v. LIVERPOOL & GREAT WESTERN STEAM CO.

(District Court, E. D. New York. April 10, 1882.)

SHIPPING—ORAL AGREEMENT—RECOVERY BACK OF FREIGHT MONEY.

Libellant and respondent entered into an agreement for the shipment by libellant, on various vessels of the respondent, of 250 horses, to be transported from New York to Liverpool, and that libellant, in consideration of a reduction in the rate of freight, should pay the freight at the time of shipment and assume all the risks of the voyage, including the risk of a failure to perform the voyage by reason of perils of the sea. Subsequently a shipment of 54 horses was made, which were lost at sea. *Held*, that the horses were taken on board in pursuance of the oral agreement, notwithstanding a bill of lading was delivered to the shipper, and that the respondent is not liable for the return of the freight money paid for their transportation.

Butler, Stillman & Hubbard, for libellant.

Beebe, Wilcox & Hobbs, for respondent.

BENEDICT D. J. This is an action brought in the name of Isaac Mehrbach, libellant, for the benefit of the Phoenix Insurance Company, to recover of the owners of the steam-ship Idaho the sum of \$2,700, being money paid those owners by the libellant as the freight of 54 horses shipped on board the Idaho on May 21, 1881, to be transported to Liverpool, but never delivered, owing to a loss of the steamer with her cargo at sea, before the completion of the voyage.

The evidence shows the shipment of the horses; the payment of the freight, amounting to \$2,700, by the libellant to the respondent; the

insurance of the freight by the libellant, and its payment to him by the Phoenix Insurance Company after the sinking of the steamer.

The evidence further shows that in March, 1881, the libellant, Mehrbach, and the respondent entered into an agreement for the shipment by Mehrbach, on various vessels of the respondent, of 250 horses, to be transported from New York to Liverpool. One of the provisions of that agreement was that Mehrbach should, in consideration of a reduction in the rate of freight from \$60 to \$50 per horse, shipped or provided for, pay the freight at the time of the shipment of the horses, and assume all the risks of the voyage, including the risk of a failure to perform the voyage by reason of perils of the seas. In pursuance of that agreement several shipments were made, and among them the one of 54 horses here in question, being the third lot. For these 54 horses a bill of lading was issued by the respondent and delivered to the libellant. This bill of lading was a blank filled up in writing. In the written portion were the words "not accountable for damage or mortality." In the printed portion were the words "freight for said goods being paid immediately on landing, without any allowance of credit or discount." In the margin of the bill of lading was written the words "54 horses, at \$50 each, \$2,700, £551 0s. 4p., paid here. H. L. S."

The evidence warrants the further finding that this bill of lading was issued after the horses had been received on board the steamer. The bill of lading asserts that the horses had been shipped, and by well-known usage a bill of lading is never given until the property is on board.

The evidence also warrants the finding that the bill of lading was issued by mistake. Such is the testimony of Mr. Underhill, and no one contradicts him.

There is no evidence to show when the \$2,700 were paid. The payment may have been made before the bill of lading was issued, and such, perhaps, is the proper inference, from the fact that the words "paid here," presumably written at the same time with the rest of the instrument, convey the idea that the payment had already been made. If the fact be that the payment was made before the delivery of the bill of lading, the circumstances lead directly to the inference that the payment was in performance of the only agreement then subsisting, viz., the oral agreement according to which the freight was then due, and the performance of the voyage at the risk of the shipper. Under this view of the transaction the libel must, of course, fail.

But if the proper inference in regard to the time of the payment be that it was contemporaneous with the delivery of the bill of lading, then the written contract presents an ambiguity, and may be explained by parol; for in one place the freight is made payable in Liverpool on delivery of the cargo; in another place it is made payable in New York on shipment of the goods. This inconsistency is explained by the surrounding circumstances; for, as it is important to notice, the bill of lading issued for these 54 horses was not the embodiment of any prior agreement, nor the result of prior negotiations. There was no prior agreement or negotiation for the shipment of 54 horses. The prior oral agreement was for 250 horses. It was a complete and valid contract, and it had already been partially performed when the bill of lading in question was issued. The 54 horses mentioned in the bill of lading were taken on board the steamer in pursuance of this prior oral agreement, and became bound by the provisions thereof. If no bill of lading had been issued for these 54 horses, and the \$2,700 paid when it was paid, there would have been no room to contend for a liability to repay. To these circumstances must be added the fact that the issue of the bill of lading arose out of a mistake. From all these circumstances the meaning of the bill of lading is plain. The words "paid here" do not refer to an advance of freight to be thereafter earned, but were inserted in order to make the written bill of lading conform to the oral agreement under which the horses had been shipped, and were intended to supersede the printed words of the bill of lading. They mean, not that the freight was to be advanced, but paid as being then due. The word used is "paid" not "advanced." If such be the proper construction of the bill of lading, no liability to repay the \$2,700 was incurred, and the libel must be dismissed.

Lastly, the words "paid here" may have been written after the bill of lading had been delivered to the shipper, and intended to be a receipt for money then paid. If so, it is evident that some different understanding from that contained in the bill of lading was entered into subsequent to the bill of lading. The act of paying the freight here was an act not provided for by the bill of lading, and must be the result of some agreement about this freight made between these parties after the bill of lading had been issued, which, because subsequent to the written contract, may be proved, although not in harmony with the written contract, and oral. See *Atwell v. Miller*, 11 Md. 348. Then arises the question, what was that subsequent agreement, in pursuance whereof the respondents, on their part, received

in New York \$2,700, which, by the bill of lading, they were entitled to receive in Liverpool, and the libellant, on his part, paid in New York \$2,700, when by the bill of lading he was to pay in Liverpool on performance of the voyage? Evidently a part of that agreement was that there should be no liability to repay the money then agreed to be received and to be paid. I say evidently, because a mistake had been committed in issuing the bill of lading; because, by the oral agreement, then partly executed, there was to be a payment of \$2,700 for these same horses, and without liability to repay; and because the shipper, after he had paid the \$2,700, insured himself at his own expense against losing the \$2,700 by the loss of the ship.

These circumstances are to my mind abundantly sufficient to repel the implication of a promise on the part of the respondents to repay the \$2,700 in case of loss of the ship; and in the absence of a promise to repay the action must, of course, fail, for it is in its nature an action for money had and received.

The case, therefore, looked at in any aspect, fails to make out a liability on the part of the defendants to repay to the libellants the \$2,700 in question.

I do not see that the fact that the action is for the benefit of the insurance company, from which the libellant has received his \$2,700, helps the case. The insurance company take the place of the shipper, and the words "paid here," on the bill of lading, were sufficient to put them on inquiry as to the circumstances under which the payment was made.

My determination, therefore, is that the libel must be dismissed, and with costs.

THE LORD CLIVE.*

(*Circuit Court, E. D. Pennsylvania.* April 29, 1882.)

PILOTAGE—STATUTES OF PENNSYLVANIA—DUTY TO ACCEPT THE FIRST PILOT OFFERING.

The decree of the district court that under the Pennsylvania statute of March 29, 1803, the master of a vessel of the draught mentioned in the act is bound to accept the first duly-qualified pilot who offers his services, affirmed on appeal.

Appeal from the decree of the district court in favor of libellant, who had filed a libel for a penalty imposed by statute in case of the refusal of an inward-bound ship to accept the first duly-qualified pilot offering his services. The district court held that the vessel was, under the Pennsylvania statute of March 29, 1803, bound to accept such pilot, and that this provision of the statute was not repealed by the subsequent statute of March 24, 1851. A full report of the case and the opinion of the district court will be found in 10 FED. REP. 135. Respondents appealed from the decree.

H. G. Ward and Morton P. Henry, for appellant.

Albert E. Peterson and W. W. Wiltbank, for appellee.

PER CURIAM. The decree of the district court is affirmed for the reasons given by the district judge, and it is therefore ordered that the same decree which was entered in the district court be entered in this court, with costs.

NOTE. See *The Lord Clive*, 10 FED. REP. 135; *The Clymene*, 9 FED. REP. 164; under the laws of Oregon, *The Glaramara*, 10 FED. REP. 678.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

SUPERVISORS OF ALBANY v. STANLEY.

(Supreme Court of the United States. April 3, 1882.)

1. STATUTE CONSTRUCTION—SEPARABLE PROVISIONS—VALIDITY.

In a statute which contains invalid or unconstitutional provisions, that which is unaffected by those provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.

2. STATE TAXATION—NATIONAL BANK SHARES—DEDUCTION OF DEBTS.

Where the federal statute (Rev. St. § 5219) permits a state to authorize all shares held in national banks by any person to be included in the valuation of his personal property and to be assessed at the place where the national bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals," and a state statute is passed in relation to taxation, requiring assessors to assess to each tax-payer his real estate at its value and his personal estate at its full value after deducting debts owed by him, and providing that if before the completion of the assessment he makes affidavit "that the value of the personal estate owned by him, after deducting his just debts and his property invested in the stock of any corporation liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more," and a statute subsequently passed, relating to the taxation of bank shares, made no provision for deducting debts, *held*, that such statutes remain a valid rule of assessment for shareholders of national banks who have no debts to deduct; that the prior statute is not in conflict with the act of congress; and that the later statute is valid, except in that it does not authorize a deduction for debts of the shareholder, which, being a distinct and separable principle, will not invalidate the whole act.

3. SAME—ASSESSMENT—NOTICE OF DEBTS TO BE GIVEN.

Under such statutes the assessors were not without authority to assess national bank shares; and where no debts existed to be deducted the assessment was valid and the tax paid was a valid tax; but where there did exist such indebtedness which ought to be deducted, the assessment was voidable but not void, the assessors being authorized in such cases, until notified in some proper manner that the shareholder owed debts which he was entitled to have deducted.

BRADLEY, J., dissenting.

In error to the circuit court of the United States for the northern district of New York.

MILLER, J. This is a writ of error to the circuit court for the northern district of New York, in which Stanley, the defendant in error, recovered a judgment against plaintiffs in error for taxes exacted and paid under legal process on shares of the stock of the National Albany Exchange Bank. A large number of the shareholders of the bank who had paid this tax made an assignment of

their claims to Stanley, and he recovered a judgment in the action for the sum of \$61,991.20, with interest and costs. The ground of this recovery was that the statute of New York, under which the shares of the bank were assessed, was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of the shares of stock owned by him, in ascertaining the amount for which the shares should be taxed. The pleadings in the case set out the sums paid by the stockholders and their names, and their assignment to Stanley, the payment under compulsion of legal process, and a demand for the repayment on the Albany county authorities. The case was submitted to the court on a waiver of trial by jury, and on the findings of fact and conclusions of law thereon by the court, judgment was rendered for plaintiffs. The facts found by the court are thus stated:

"First. That the allegations of the complaint in regard to the citizenship of the plaintiff, the citizenship and powers and liabilities of the defendant, the organization and capital of the National Albany Exchange Bank, the ownership of the shares of capital stock of the National Albany Exchange Bank, the assessment of the stockholders in said bank, named in said complaint, by the board of assessors of the city of Albany, the names and residences of said stockholders, the collection of taxes from said stockholders, and the payment of the same to the county treasurer of the county of Albany, and the demand made by Chauncy P. Williams, before the commencement of this action of the treasurer of the county of Albany, are true as therein set forth.

"Second. That the amounts collected from the said stockholders and paid to the treasurer of the county of Albany, and the times when the said amounts were so paid to said treasurer, were as follows, to-wit: \$907.90 paid August 11, 1874; \$127.84 paid August 11, 1874; \$1,868.06 paid May 1, 1875; \$1,409.33 paid May 27, 1876; \$1,202.32 paid May 3, 1877; \$1,336.60 paid April 17, 1878; \$1,473.02 paid April 22, 1879; \$11,604.75 paid May 1, 1875; \$8,147.26 paid May 27, 1876; \$7,822.34 paid May 3, 1877; \$7,357.94 paid April 16, 1878; \$6,243.20 paid April 21, 1879.

"Third. That the sums above named were not paid voluntarily by said stockholders, but were forcibly collected by the marshal of the city of Albany under a warrant issued to such marshal by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the board of supervisors of the county of Albany, by levying upon the property of the said stockholders respectively, as alleged in said complaint.

"Fourth. That the said assessments were made and said amounts collected and received by the treasurer of the county of Albany, as above stated, under color of an act of the legislature of the state of New York, entitled 'An act authorizing the taxation of the stockholders of banks and surplus funds of savings banks,' passed April 23, 1866, being chapter 761 of the Laws of 1866, and not otherwise.

"*Fifth.* That the allegations of the complaint with reference to the assignments by the respective stockholders of said bank of their claims against the county of Albany, by reason of the matters alleged in the said complaint, are true as set forth in said complaint, and that the plaintiff, at the time of the commencement of this action, was the holder and owner of all claims against the county of Albany, or against the defendant, arising out of the matters alleged and set forth in said complaint.

"*Sixth.* That the said act of the legislature of the state of New York, chapter 761 of the Laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations, in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint, permitted and required by the laws of the state of New York to be made from the value of every kind of personal property and moneyed capital, other than bank stock, in assessing the same for the purpose of taxation.

"*Seventh.* That the allegations in the fourth count of said complaint, as to the presentation to the said board of assessors by said Chauncy P. Williams of the affidavit of his indebtedness, and the request by him for a reduction of his assessment on his bank stock, and the refusal of said board of assessors to make such reduction, and the application by said Williams to the supreme court of the state of New York for a writ of *mandamus*, and the subsequent legal proceedings thereon, including the decision of the supreme court of the United States, are true, as set forth in said fourth count."

It does not appear by this finding of the court that any shareholder, for whose payment of taxes this suit is brought, made affidavit or other application in regard to his indebtedness, that it might be deducted from his assessment, nor that any of these shareholders owed anything to be deducted from the assessed value of the shares held by them, except the seventh finding of facts in regard to C. P. Williams.

Unless, therefore, the other shareholders who paid the tax on the shares of their stock were entitled to recover back the sum paid without any evidence that they had made affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to assessment of bank shares as to other personal property, and without any evidence that they owed anything whatever to be deducted from any assessment of their personal property, including bank shares, the judgment in this case cannot be supported.

The judge who decided the case on the circuit found as a conclusion of law that the assessment of all shares of national banks was void because the statute of New York, under which the assessments were necessarily made, was void, as being in conflict with the act of congress on

that subject, and he declares, in an opinion delivered in the case of *National Albany Exchange Bank v. Hills*, in a chancery suit, that the assessments in this class of cases are absolutely void, the assessors having acted without any jurisdiction. If this view of the subject be sound—if the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or if there was no law by which in any case they could assess and collect tax on shares of national banks—then it is of no consequence to inquire of anything beyond the fact that plaintiff's assignors did pay such a tax under legal compulsion. On the other hand, if the law is for any purpose a valid law, and if it can be held to furnish the rule of taxation as to any class of owners of national bank shares, then the *onus* is on plaintiff to show that his assignors are not of that class.

The question here to be decided arises under two statutes of the state of New York in regard to taxation. The first of these is the act of 1850, relating to the assessment and collection of taxes in the city of Albany. The sixth section of the act requires the board of assessors to prepare an assessment roll, in which there shall be set opposite the name of each tax-payer (1) all his real estate liable to taxation, and its value; (2) the full value of all his personal property after deducting the just debts owing by him. Section 9 of the act is as follows:

"If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In 1866 the state enacted a law concerning the taxation of bank shares which was evidently intended to meet the requirements of the act of congress in relation to state taxation of the shares of national banks, and the provision of this statute related only to taxing stockholders in banks, and to the capital invested in individual banks. The first section of this act reads as follows, and it contained no other provision for deductions as the basis of taxation, except what is found in this section:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this state or of the United States, but the stockholders in such banks and banking associations shall be

assessed and taxed on the value of their shares of stock therein. Said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this state. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held, to the whole amount of the capital stock of said bank or banking association; and provided further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association; but the same shall be subject to state, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

In the case of *People v. Dolan*, 36 N. Y. 59, the question was whether, taking these two statutes together, an owner of shares of stock in a national bank was entitled to deduct from the assessed value of his shares the just debts owing by him. It was argued that into this act of 1866 for the taxation of bank shares there should enter, as part of it, the provision of the act of 1850 which allowed this deduction as to all personal property, and that nothing in the act of 1866 forbid this or was inconsistent with it. It was also insisted that unless the act of 1866 was so construed it would violate the act of congress which only permitted the shares of national banks to be taxed at the same rate as other money capital of the citizens of the state. But the court of appeals overruled both propositions, and held that the true meaning of the act of 1866 was that no such deduction should be made, and that as thus construed it was not in conflict with the act of congress on that subject.

In the subsequent case of *Williams v. Weaver*, Williams, who was a shareholder in the National Albany Exchange Bank, made the affidavit required by section 9 of the act of 1850, and, presenting it to the board of assessors of the county, demanded a reduction in accordance with it from the valuation of his bank shares. On the refusal of the assessors to comply with this request a proceeding was commenced in the courts of the state, in which the court of appeals reaffirmed the principles of the case of *People v. Dolan*. That case coming into this court by writ of error, it was here held that while we were bound to accept the decision of the highest court of the state in construction of its own statute, the act of 1866 as thus construed was in that particular in conflict with the act of congress, because it

did tax shares of the national banks at a higher rate than other moneyed capital in the state. In that case, reported in 100 U. S. 539; S. C. 21 Alb. Law J. 210, there are no words which declare the act of 1866 to be void, but the careful language of the decision is that "in refusing to plaintiff the same deduction for debts due by him from his shares of national bank stock that it allows to others who have moneyed capital otherwise invested, it is in conflict with the act of congress."

Accepting, therefore, as we must the act of 1866 as construed by the court of appeals of New York as not authorizing any deduction for debts by a shareholder of a national bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the state, or as to private bankers, of which there no doubt exists a large number of both classes.

What is there to render it void as to a shareholder in a national bank who owes no debt which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest, and which, if decided either way, affect no right of theirs?

It would seem that if the act remains a valid rule of assessment for shares of state banks and for individual bankers, it should also remain the rule for shareholders of national banks who have no debts to deduct, and who could not therefore deduct anything if the statute conformed to the requirements of the act of congress.

It is very difficult to conceive why the act of the legislature should be held void any further than when it affects some right conferred by the act of congress. If no such right exists, the delicate duty of declaring by this court that an act of state legislation is void is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.

The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must

remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.

In the case of *Railroad Cos. v. Schutte*, 103 U. S. 118, decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. "It is contended," said the court, "that as the provision of the act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law." And yet this was a case in which the scheme of exchanging the bonds of the state for the bonds of the company, in order that the company might get the benefit of the better credit of the state, was accompanied by a mortgage created alone by the statute in favor of the state as her security, and the court, while holding that the exchange of bonds was void as being in conflict with the constitution of the state of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid.

The language of this court in the two cases cited in the brief of *U. S. v. Reese*, 92 U. S. 214, and *Trade-mark Cases*, 100 U. S. 82, concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. Said the court in the latter case: "While it may be true that when one part of the statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each may stand alone, it is not within the judicial promise to give to the words used by congress a narrower meaning than they are manifestly intended to bear. * * *" The case of *U. S. v. Reese* also implies that there may be unconstitutional provisions which do not vitiate the whole statute or even a single section, because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that in both these cases it was a statute creating and punishing offences criminally, which was to be construed in regard to the limited constitutional power of congress in criminal matters.

The case of *State Freight Tax*, 15 Wall. 232, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the constitution of the United States. The act imposed a tax upon every ton of freight carried by every railroad company, steam-boat company, and canal company doing business within the state. The railroad company who contested the tax presented a

statement which separated the freight transported by them between points solely within the state and limited to such destination, and that which was received from or carried beyond those limits. This court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said:

"It is not the purpose of the law but its effect which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. * * * The conclusion of the whole matter is that, in our opinion, the act of the legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the state or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void."

The same language is repeated in *Erie Ry. Co. v. Pennsylvania*, 15 Wall. 282, decided at the same time, and both cases were remanded to the state court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the state and not on interstate commerce.

This is a clear case of distinguishing between the articles protected by the constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.

But in a review of the cases in this court on this subject, that of *Austin v. Aldermen of Boston*, 14 Allen, 357, will be found to most nearly resemble the one before us. It related to the same matter of invalidity of a statute of a state taxing shares of the national banks as being in conflict with the act of congress. That act said that such taxes might be assessed at the place where said bank was located and not elsewhere.

The act of the Massachusetts legislature directed the assessment and taxation of the shares at the place where the owner resided. The plaintiff in error, Austin, having contested the tax on his shares in the courts of the state unsuccessfully, brought the case here by writ of error. This court declined to enter upon the question of the validity of the Massachusetts statute, because the case did not show that Mr. Austin was taxed on his shares in any other place than Boston, the place where the bank was located.

The argument of counsel in the case before us is that any tax or a tax on any person on account of his bank shares is void because the whole of the New York statute is void. If the argument is sound it was equally applicable to Austin's case.

The statute of Massachusetts, which made no limitation of taxation to the place where the bank was located, must be held void under any principle which would wholly invalidate the statute of New York, because it did not allow the deduction of the owner's indebtedness from his shares. And if the Massachusetts statute was utterly void as to national bank shares, then the tax on Mr. Austin's shares in Boston was void, and he had a right to be protected against the unconstitutional statute. The court evidently went upon the principle that the statute was only void as against the act of congress in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point. To the same effect are the cases of *People v. Bull*, 46 N. Y. 57; *Gordon v. Cornes*, 47 N. Y. 608; *Village of Middleton, Ex parte*, 82 N. Y. 196.

If we examine the statute before us on principle we shall find but little reason to hold it to be wholly void as regards bank shares. If the statute stood alone there is nothing in it in conflict with the act of congress. It is only when we look to the other statute, which prevents the deduction of debts from the entire value of personal property, that we discern the discrimination against bank shares. The act declares that bank shares shall be taxed according to their value, after deducting the real estate and other property on which the bank itself pays tax. This is eminently just. It provides for a mode of ascertaining their value, the officers who shall do it, and how the tax shall be collected. In all this the law is valid except that it does not authorize a deduction for debts of the shareholder. This is a distinct and separable principle. When the shareholder has no debts to deduct the law provides a mode of assessment for him which is not in conflict with the act of congress, and the law in that case can be held valid. Under the decision in *Austin v. Aldermen of Boston* it is valid as to him.

If he has debts to be deducted the case of *Williams v. Weaver* shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the remainder of the law remains valid. In other words, in such a case so much of the law as conflicts with the act of congress in the given case is held invalid, and that part of the state law which is in accord with the act of congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does; between the cases in which it violates the act of congress and those in which it

does not. There is therefore no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts.

It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted the assessment was valid and the tax paid under it a valid tax; that in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted.

If they then proceeded in disregard of the act of congress the assessment was erroneous, and the case of *Williams v. Weaver* shows how that error could be corrected.

The case before us shows no error in any case but that of Mr. Williams, and in that case he has obtained the judicial decision of this court that the tax he paid was illegally exacted from him. Nor do the facts of his case raise the question whether, in a case where the debts of the shareholder do not equal the assessors' value of his shares, the tax is wholly erroneous, or only so much as represent the assessment of his indebtedness that should have been deducted, for his affidavit was that his debts equalled the value of his bank shares. Nor do the findings of fact raise the question whether, without making affidavit and demand on the assessors, a suit can be maintained to recover when such indebtedness actually existed; for he did make affidavit and demand, and no other tax-payer has shown any such notice or demand, or that he had any indebtedness to be deducted. There is neither finding of fact nor averment in the pleadings on either point as to any other assignors of plaintiff than Mr. Williams. It results from these considerations that the judgment of the circuit court is reversed, and that on the finding of facts judgment should be rendered for plaintiff on the fourth count for the amount of the tax paid by Williams, with interest, and on all the other counts for defendants.

It is so ordered.

BRADLEY, J., *dissenting*. I dissent from the judgment of the court in all these cases for the reason that, in my opinion, the state laws authorizing the capital stock of national banks to be taxed without allowing any deduction for the debts of the stockholders, where such deduction is allowed in relation to other moneyed capital, are void in

toto so far as relates to national banks. To hold the law valid except as to those who are actually indebted and actually claim the benefit of the deduction, and actually set it up in a suit brought by the bank for relief, is practically to render the condition of the act of congress nugatory, and to deprive the national banks and their stockholders of its protection. The tax, though laid on the stockholders, is required to be paid by the bank itself, which must pay without deduction unless the shareholders give the bank notice of the amount of their debts. This is a most ingenious expedient to avoid such deductions altogether. The probability that not one in ten of the shareholders will ever have notice of the assessment in time to make the claim, and the natural reluctance they would have (if they had notice) to lay the amount of their debts before a board of bank officers will effectually secure the state from claims for deduction. And that was no doubt the object of the law. But this unequal operation of it, in its practical effect, might not be sufficient to render it void. It is void, in my judgment, because it makes no exception, but is general in its terms, subjecting to taxation the capital stock of national banks without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots. It is not like the case where a portion of a law which may be separated from the rest can be declared invalid without affecting the remainder of the law; nor like the case of a general law which the legislature has power to make, but from the operation of which some individuals may have a legal or constitutional exemption which they can plead in their defence; but it is wrong in form, wrong *in toto*. The legislature had no authority or power to make the capital of national banks taxable except in the same manner as other moneyed capital of the state. The practical iniquity of the law is seen in this, that it affects the value of all the stock, whoever holds it. As the law stands it acts as a prohibition against the purchase of the stock by those who owe debts, and they constitute a considerable portion of every community. It does not help the validity of the law for us to declare that it is *pro tanto* void, and in fact make a new law for the state. Its validity must be decided by its actual form and terms. If these cannot stand, the law is void.

NOTE. The cases affected by this decision are: *First Ward Bank v. Hughes*, 6 FED. REP. 737; *Albany City Nat. Bank v. Maher*, Id. 417; *First Nat. Bank of Utica v. Waters*, 7 FED. REP. 152; *First Nat. Bank of Chicago v. Farwell*, Id. 518; *Nat. Albany Exch. Bank v. Wells*, 18 Blatchf. 540; *Van Allen v. The*

Assessors, 3 Wall. 573; affirmed in *People v. Com'rs*, 4 Wall. 244; and see generally, on the subject of state taxation of national banks, *St. Louis Nat. Bank v. Papin*, 4 Dill. 29; *Bank of Omaha v. Douglas Co.* 3 Dill. 299; *First Nat. Bank v. Douglas Co.* Id. 330; *Union Nat. Bank v. Chicago*, 3 Biss. 82; *Collins v. Chicago*, 4 Biss. 472; *Nat. Bank v. Com.* 9 Wall. 353; *Lionberger v. Rouse*, Id. 468; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490; *Hepburn v. School-dist.* 23 Wall. 480; *Waite v. Dowley*, 94 U. S. 527; *Adams v. Nashville*, 95 U. S. 19; *Pelton v. Nat. Bank*, 101 U. S. 146; *Merchants' Nat. Bank v. Cumming*, 17 Alb. L. J. 345; *City Nat. Bank v. Paducah*, 5 Cent. L. J. 347; *Bank of Commerce v. Tennessee*, 25 Alb. L. J. 188.—[Ed.]

HILLS v. NATIONAL ALBANY EXCHANGE BANK.*

(*Supreme Court of the United States.* April 3, 1882.)

1. INJUNCTION—COLLECTION OF STATE TAX—SUIT BY NATIONAL BANK.

A suit may be maintained by a national bank on behalf of the shareholders to enjoin state officers from the collection of a state tax on the shares of the bank, on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owed by the shareholders.

2. SAME—SUIT BY SHAREHOLDER.

A shareholder who has made the affidavit and demand therefor required by law, may bring suit to enjoin the collection of such tax.

3. SAME—TENDER, WHEN NOT NECESSARY.

As a general rule, when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused, or that payment or performance will not be accepted.

4. SAME—SUIT ON BEHALF OF SHAREHOLDERS.

Where it is shown that an affidavit and demand would have been unavailing, the shareholders may be permitted to show in an action by a national bank, brought on their behalf, the deductions to which they were entitled, and the collection of the amount of such deductions would be enjoined.

Appeal from the circuit court of the United States for the northern district of New York.

MILLER, J. This is an appeal from a decree in chancery of the circuit court for the northern district of New York, and it presents very much the same questions that have just been decided in the case of *Sup'rs of Albany Co. v. Stanley*. That was a common-law action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank, and the present suit was brought to enjoin the appellants from collecting a similar tax assessed and yet unpaid for that year. In this case the bank sued in right of and as representing all the stockholders, and the cir-

*This case reverses S. C. 5 FED. REP. 248.

cuit court made a decree perpetually enjoining the collection of all taxes on shares of said bank. Several questions are raised or rather suggested which we think have heretofore been decided by this court, such as the right of the bank to maintain a suit on behalf of its shareholders. This was established by the cases of *Cummings v. Nat. Bank*, 101 U. S. 153; *Pelton v. Nat. Bank*, Id. 143. There is also an attempt to show that there was a settled rule of purpose on the part of the assessors to value the shares of the appellee bank higher in proportion to their real value than in the case of other banks, bankers, and moneyed corporations. We think the proof fails to establish this in a manner to justify the interference of a court of equity. *Nat. Bank v. Kimball*, 103 U. S. 732.

The bill, however, in its main feature asserts the right to an injunction on the ground that the act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares of the debts honestly owing by the shareholders. And the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must of course be reversed, because as to the larger number of the shareholders whose taxes are enjoined there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are (1) that one shareholder owning 532 shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed one dollar, and presented said affidavit to the board of assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Mr. Chauncey P. Williams; (2) the further allegation of the bill on that subject is that other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper deduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases and from knowledge of the decisions of the court of appeals of New York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court enjoining the collecting officers as to

all the tax assessed on the shares of this bank must be reversed, the question arises, what shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction?

With regard to the case of Mr. Williams we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. The question is whether the fact clearly established, that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett v. Hunter*, 9 Wall. 326; *Tacey v. Irwin*, 18 Wall. 549; *Atwood v. Weems*, 99 U. S. 183.

Without elaborating the matter we are of opinion that, considering the decision of the court of appeals of New York, the action of the assessors in the case of Mr. Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is therefore not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid. And we are of opinion that it is open to the court below, when this case returns, to permit such amendment of the pleadings as will enable plaintiff to make proper allegations on that subject, or by reference to a master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case.

which is not shown to be in excess of the just debts of the shareholder that should be deducted.

The decree of the circuit court is reversed, and the case remanded for further proceedings in accordance with this opinion.

State Taxation—Injunction.

GERMAN NAT. BANK OF CHICAGO *v.* KIMBALL. Appellant filed a bill in chancery in the circuit court for the northern district of Illinois to enjoin defendant as collector, and Samuel H. McCrea as treasurer, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock, on the general ground that the assessment violates the provision of the act of congress concerning national banks, which forbids the states from taxing these shares at any higher rate than other moneyed capital within the state, and that it also violates the provision of the constitution of Illinois concerning uniformity of taxation. The case was taken up on appeal to the supreme court of the United States, and a decision was rendered at the October term, 1880, affirming the decree of the circuit court, dismissing the bill. Mr. Justice *Miller* delivered the opinion of the court.

No one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; nor should he be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity.

The cases cited in the opinion were: State Railroad Tax Cases, 92 U. S. 575; Williams *v.* Weaver, 100 U. S. 539; Pelton *v.* National Bank, 101 U. S. 143; Cumming *v.* National Bank, *Id.* 153.

State Tax on National Bank Shares—Injunction.

EVANSVILLE NAT. BANK *v.* BRITTON, 25 Alb. Law J. 432. Cross-appeals from a decree of the circuit court for the district of Indiana, decided in the supreme court of the United States, April 3, 1882; Mr. Justice *Miller* delivering the opinion of the court.

The taxation of bank shares under the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of congress. The decree of the circuit court perpetually enjoining the collector as to those shareholders who had proved in the case that at the time of the assessment they owed debts which should have rightfully been deducted, and dismissing the bill as to other shareholders, where no evidence was given that they owed any debts which could have been deducted from the value of the shares, affirmed; *Waite*, C. J. dissenting, and Mr. Justice *Gray* concurring in the dissent.

The cases cited in opinion were: Hills *v.* Nat. Albany Exch. Bank, *ante*, 93; Williams *v.* Weaver, 100 U. S. 539; Van Allen *v.* Assessors, 3 Wall. 573.

YUENGLING, Jr., v. SCHILLE.

(Circuit Court, S. D. New York. April 3, 1882.)

1. COPYRIGHT—CHROMO.

A chromo, if a meritorious work of art, may be copyrighted, though designed and used for gratuitous distribution as an advertisement for the purpose of attracting business.

2. SAME—WHO ENTITLED TO COPYRIGHT.

It is only "authors and inventors" who, under the constitution, art. 1, § 8, are directly entitled to copyright. The title of all other persons is secondary, and derivative from them only; and, in claiming an injunction, third persons must show a legal title and an exclusive right to the copyright, lawfully derived from the author or inventor; to allege that the plaintiff is "proprietor," without more, is not enough.

3. SAME—INJUNCTION—INFRINGEMENT—PROTECTION LIMITED TO NATIVE ART.

In a suit for an injunction to restrain an alleged infringement, where it appeared that the plaintiff had imported copies of a chromo designed and printed in Europe by a foreign artist, and that the plaintiff had copyrighted the chromo by depositing two of his imported copies with the librarian of congress, and it further appeared that the defendant had never known of such chromo being copyrighted, had never seen any copyrighted impression, and had availed himself, in making a new chromo, of some material portions of the same design as plaintiff's chromo, which defendant had taken from a copy independently imported from Europe, and it did not appear whether the design of the plaintiff's chromo was new or old, or whether plaintiff had ever acquired any exclusive right from the artist, *held*, that the motion for a preliminary injunction should be denied. *Held, also*, that congress, in the revision of the copyright act of 1870, and in adding in that act to the previous subjects of copyright "a painting, drawing, chromo, statue, statuary, and models or designs intended to be perfected as works of the fine arts," did not intend any reversal or change of its inflexible policy, ever since the act of 1790, of protecting only native or resident authors and artists, and that the word "proprietor," in section 86 of the act of 1870, and in section 4952 of the Revised Statutes, must be construed in the limited and restricted sense in which it has been used in every act from that of 1790 downwards, viz., as the legal representative of a right derived from a native or resident author or artist.

4. STATUTES—AMENDMENTS, HOW CONSTRUED—CHROMOS EMBRACED IN "PRINTS."

Amendments of statutes are to be construed in harmony with a long-established policy rather than upon a mere literal reading which would introduce two diverse and contradictory policies in the same statute. *Held, also*, that "chromos," being in fact chromo-lithographic *prints*, were embraced in sections 1 and 8 of the act of May 21, 1831, under the term "prints," as well as in sections 86 and 103 (16 St. at Large, 212, 215) of the act of 1870, and are within the restrictions of section 4971 of the Revised Statutes; and that no copyright upon a chromo designed by a foreign artist abroad can be acquired by his representative resident here as "proprietor."

Motion for a Preliminary Injunction for Infringement of a Copyright.

Charles Unangst, for plaintiff.

W. F. Pitshke, for defendant.

BROWN, D. J. The plaintiff moves, upon a bill of complaint and affidavits, for a preliminary injunction to restrain an infringement of the plaintiff's rights under a copyright alleged to have been obtained by him on the twenty-third of August, 1880, upon a "chromo" entitled "Gambrinus and his followers." The moving papers allege that the complainant on that day was a citizen of the United States, and "proprietor of said chromo;" that he filed on that day, before publication, in the office of the librarian of congress, the title or description thereof, and on the same day deposited in his office two copies of the same, and gave notice of his copyright by inscribing on the visible front of such chromo, near the bottom, the words "Copyrighted 1880, by D. G. Yuengling, Jr., New York;" that he has been at great expense in producing such chromo, and that the same is of great value to him; that he has used it as a gratuitous advertisement in his business as a lager-beer brewer; and that the defendant is about to issue a piratical imitation of such chromo, in violation of the plaintiff's right in such copyright.

The complainant's chromo is of evident artistic merit. It is designed as a symbolic glorification of lager-beer drinking. In the center is a conspicuous figure of King Gambrinus, his left arm resting upon a keg of lager, and his right holding aloft a foaming glass of that beverage. On either side of him are a dozen figures of persons representing various classes in life, into whose eager hands his page is distributing the drink. This chromo, by its subject, its brilliant coloring, its excellent finish, and the artistic grouping of its figures, forms a striking picture, suitable for hanging in saloons, and well calculated to draw attention to the plaintiff, whose name is printed in large type beneath the figures as a person engaged in the lager-beer business, and constituting, therefore, a valuable mode of advertising. Among the Germans, and in the lager-beer trade, "Gambrinus" is familiarly known as the inventor of lager beer, while king of Flanders, as the legend goes, who used it first as a potion or draught.

The defendant's chromo, claimed to be an infringement, is a few inches smaller than the first, and presents the same general grouping, expression, and coloring of the figures, though having some conspicuous changes. Upon the head of the lager-beer cask the words "Bock Beer" are conspicuously printed; and the figure of a goat, with its forefeet upon the top of the cask, appears prominently in the foreground beside the king. The troubadour, who in the first picture is

reclining upon the ground beside a maid drawing beer at the spigot, is omitted in the defendant's chromo, which also contains at the left a prominent typical figure of "Brother Jonathan," who is substituted in the place of a tailor in the first. There are various other minor changes.

Upon the whole, it is plain that the defendant's chromo is formed upon the same general design as the first, although with very important variations, and is an infringement of it, if the first was lawfully copyrighted before any publication of it. The defendant's chromo is designed as a card advertising the sale of "bock beer," which is sold mainly in the months of April and May.

From the defendant's affidavits it, however, appears that the complainant's chromo was designed in Europe by G. Bartsch, an alien European artist, whose name is engraved on the face of the print; that in the right-hand corner beneath are printed the words, "Witte-mann Bros., Publishers of Art Lithographs, New York;" that the work is strictly a chromo-lithographic print; that all the complainant's copies of it were printed and completed in Europe, whence it was imported to this city by the complainant, who thereupon undertook to take out a copyright by depositing two copies with the librarian of congress, as above stated, and stamping upon the left-hand corner the words added by the complainant, "Copyrighted 1880, by D. G. Yuengling, Jr., New York;" that the defendant has long been a designer, and is also engaged in the lager-beer advertising business; that in the summer of 1880, at the book-printer's establishment of Keely & Bartholom, 22 College place, in this city, where he had previously been accustomed to get work done, he was shown a copy of all the colored portion of this chromo, but without the copyright stamp thereon; that he was informed by them at that time that it was a German work, not copyrighted, and had shortly before been imported and received by them from Europe; that he was then allowed to take this copy away with him, and had retained it ever since, and had made his own chromo therefrom, with the variations above pointed out; that he never saw any copy with any copyright stamp upon it, and had no knowledge of any such copyright until the commencement of this suit.

It is urged on the part of the defendant that the plaintiff's chromo is not the subject of a copyright, because it was designed, used, and circulated by him as a gratuitous advertising card for the benefit of his private business as a lager-beer brewer, and not for the instruction or improvement of the public. The case of *Cobbett v. Woodward*, Law

Rep. 14 Eq. 407, relied on by the defendant, was a case where the catalogue of an upholsterer, containing engravings of the articles offered by him for sale and circulated gratuitously, was held not to be the subject of copyright on this ground. A similar decision was made in this court in the case of *Collender v. Griffith*, 11 Blatchf. 212, concerning engravings of billiard tables offered for sale; but in that case it was held that the engravings were not works of art, and did not have any value or use as such, and that it was a mere mode of advertising the tables for sale. The case of *Ehret v. Pierce*, 18 Blatchf. 302, [S. C. 10 FED. REP. 553,] was decided upon the same principle. The case of *Cobbett v. Woodward*, *supra*, has not been followed in England, but was substantially overruled in the subsequent case of *Grace v. Newman*, Law Rep. 19 Eq. 623.

The plaintiff's chromo in the present case is not a mere engraving or print of any article which the complainant offers for sale. It is a work of the imagination, and has such obvious artistic qualities as, in my judgment, render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it. Where the work in question is clearly one of artistic merit, it is not material, in my judgment, whether the person claiming a copyright expects to obtain his reward directly through a sale of the copies, or indirectly through an increase of profits in his business to be obtained through their gratuitous distribution.

There are several grounds, however, why the preliminary injunction sought in this case should not, I think, be granted.

1. It being conceded that the complainant is not the author or designer of this chromo, it is incumbent upon him to show how he became entitled to any exclusive copyright of it. In *Green v. Bishop*, 1 Cliff. 186, 198, *Clifford, J.*, says:

"It is undoubtedly true that when a party comes into a court of law or equity seeking protection of a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication. *Little v. Gould*, 2 Blatchf. 181. The plaintiff does not show any such derivative title, and it appears that he is not the author."

The owner or proprietor of a work has not, since the act of 1870, any more than before, in that character alone any right of copyright. It is only to "authors and inventors," or to persons representing the author or inventor, that congress is authorized by the constitution to grant a copyright. Const. art. 1, § 8. The right of any other person than the author or inventor must therefore be a purely secondary and derivative one, and in enforcing any alleged copyright such a

person must show an exclusive right lawfully derived from the author or inventor; and this the plaintiff has not done. I find no other averment in the papers save that in the bill that on the twenty-third of August, 1880, he was "the proprietor of said chromo." This is not enough. It does not show any exclusive right derived from an original author. It appears, in opposition, that the work was designed and printed in Europe by an alien artist, and that copies of this design were imported into this country and came into defendant's hands independently of the complainant. There is no averment either that the design itself was *new*, or that the lithographic stones for the print were engraved by any person employed by the plaintiff or in his behalf, or that any right of copyright was ever transferred, or intended to be transferred, to the plaintiff by the author or artist. The "chromo" may be a mere copy of an European painting long since published in Europe, and free to be copied by any one. For aught that appears, the whole design may have been common property for an indefinite period, as would seem to be the case with the typical form of King Gambrinus. The complainant may have been the "proprietor" of the chromos which he imported, and may have "produced them at great expense," and yet have no exclusive right whatever, as between himself and the European artist, to the sole use even of the lithographic stones in Europe for the multiplication of any additional copies, much less to the original design. In that case he could acquire no copyright which would exclude the defendant, or any other person, from availing himself, either wholly or in part, of other copies obtained from Europe, either from the same stones, or from the common source of the design.

In *Johnson v. Donaldson*, 3 FED. REP. 22, (18 Blatchf. 287,) in reference to an alleged infringement of the copyright of a chromo, it was held by Wallace, J., that if the plaintiff acquired his copyright by appropriating a sketch from a foreign publication, he would not become a proprietor thereof, and could acquire no exclusive copyright; that even if the plaintiff were the artist and designer of the picture so appropriated, the "defendant would not be liable if he did not avail himself, directly or indirectly, of the plaintiff's production."

In *Rosenbach v. Dreyfuss*, 2 FED. REP. 217, it is said by Choate, J.: "It is not enough that the defendant *may* be liable if the facts stated in the complaint be true. It must appear that he *is* liable if the complaint is true." And judgment was for the defendant on demurrer, because it did not certainly appear that the articles described were

articles for which a copyright could be granted under the laws of the United States.

In this case it appears affirmatively, from the defendant's affidavits, that in making his chromo he has not availed himself of any copy of the chromo imported by the plaintiff; while from the want of any averment, either that the design was new, or that the plaintiff had ever acquired the exclusive rights of the foreign artist, in case the artist had any such exclusive right, it is impossible to say that the defendant, in availing himself of parts of a foreign copy, independently imported, violated any right of the author, much less of the plaintiff, who could only claim through the author.

2. The plaintiff claims that the act of July 8, 1870, (16 St. at Large, § 86; Rev. St. § 4952,) authorizes a citizen or resident of this country, if he be "proprietor" of any book, map, print, chromo, etc., to obtain a copyright therefor, although the author, inventor, or designer is an alien. The act of 1870, for the first time, uses the word "proprietor" in connection with the words "author, inventor, or designer," as one of the persons to whom a copyright may be granted, although ever since the act of 1790 a proprietor might obtain a copyright if he were the lawful representative of the exclusive rights of a native or resident author. Thus, though the connection in which the word "proprietor" is used in the act of 1870 is new, the use of the word itself in relation to copyrights is as old as the laws of copyright. 1 St. at Large, p. 125, §§ 2, 3, 4, 6; 2 St. at Large, p. 171, §§ 1, 3; 4 St. at Large, p. 437, § 3; 11 St. at Large, p. 139, § 1; 13 St. at Large, p. 540, § 2; 8 Geo. II. c. 13, § 1; 17 Geo. III. c. 57.

The literal reading of the section of the act of 1870 now embodied in section 4952 of the Revised Statutes, does not require that both the "author" and "proprietor" shall be citizens or residents of the United States. It provides that "any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person," may obtain a copyright; and section 103 of the act of 1870, embodied in section 4971 of the Revised Statutes, provides that "nothing therein shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photo-

graph, written, composed, or made by any person not a citizen of the United States, nor resident therein." By virtue of the latter section an exclusive copyright in the work of any foreign author or artist in the subjects mentioned in that section is prohibited; but this section does not embrace the words "painting, drawing, chromo, statue, statuary, and models," which were introduced into the copyright law for the first time in the act of 1870; and on this ground it is urged by the complainant that a "proprietor" may obtain a copyright on the last-mentioned subjects, though the artist or author is an alien, because these are not prohibited by section 4971.

There are three objections to the plaintiff's contention in this respect: *First*, that it involves a reversal of the policy of the government from its foundation to protect American artists and authors only; *second*, that the word "proprietor," as used in the copyright laws, in itself means the representative of an artist or author who might himself obtain a copyright; and, *third*, that chromos are in reality embraced under the description of a "print" in the restrictive section, 4971.

It cannot be doubted that the purpose of the copyright laws from the foundation of the government has been to encourage native talent, and to protect American authors and artists only, (*Drone, Copyright*, 231, 257,) as the English acts were designed "to protect only those works which were designed, engraved, etched, or worked in Great Britain." *Page v. Townsend*, 5 Sim. 395, 404.

In the first act on the subject, that of May 31, 1790, the prohibition against an extension of the copyright to alien authors was as broad as the section authorizing copyright in favor of resident authors. 1 St. at Large, p. 124, §§ 1, 2, 5. With every extension of the subjects of copyrights made by subsequent statutes a corresponding restriction was inserted in the prohibitory section relating to foreign authors or artists until the act of 1870, when the few additional subjects above mentioned were added to the subjects of copyright without any corresponding insertion in the restrictive clause as respects foreign authors or artists. But even this omission, which was probably accidental, would not of itself have sufficed to admit copyright upon the works of foreign authors or artists, because the section authorizing the granting of copyright has always been limited to authors or artists being citizens or residents of the United States, or to their lawful representatives or assigns. It is only by the introduction of the word "proprietor" into the authorizing clause of the act of 1870, § 86, that any doubt could arise in regard to the new subjects of copyright then first introduced and not expressly restricted

as respects foreign artists; and its effect, by a mere literal reading, to allow a copyright on the works of foreign artists, has the appearance of being accidental only. After a policy, so early established and so constantly upheld, in reference to every subject of copyright, through all the extensions of the law up to 1870, to limit its protection to the works of native or resident authors, there is certainly a strong presumption that no change in this policy was intended in respect to a few articles only, added for the first time by the act of 1870, as subjects of copyright. There is nothing apparent in the nature of these new subjects of copyright themselves to distinguish them from the subjects of copyright previously existing which can serve as a probable foundation for any such supposed change of policy.

A copyright here, upon such articles designed and manufactured abroad, would be a double injury to American authors and designers. It would not only encourage the employment of foreign artists to the neglect and detriment of native designers, but it would prevent the use by the latter in this country of the foreign material, which would otherwise find its way here to the education and development of our native artists, and which would serve as models or suggestions for their own work. If all foreign works of this kind can be copyrighted in this country, through a mere transfer to some resident dealer, or agent of the foreign authors, our native artists will be thereby effectually foreclosed and debarred from availing themselves of all such materials for the improvement of their own works. Every intendment and every presumption to be derived from the history of copyright in this country, and from other parts of the act of 1870, seem to me to be against any such intention in that act. The effect of the literal construction contended for by the plaintiff would, moreover, be to make the act of 1870 inaugurate two diverse and conflicting policies in reference to the articles which may be copyrighted under section 86, now section 4952, Rev. St.; one policy virtually protecting foreign artists by copyright in respect to the few subjects first introduced into the law of 1870, and another policy of excluding them in regard to all the other and much larger number of subjects of copyright named in that act. I cannot believe, in the light of the history of the copyright acts, that, in reference to these few new subjects, congress intended to inaugurate any such change of policy, or to grant an exclusive copyright upon the importation of works wholly designed, manufactured, and completed abroad, upon merely depositing copies of lithographs in the congressional library by some resident owner. Such a construction would in effect confer upon foreign authors and artists, in respect to these sub-

jects of copyright, all the advantages of an international copyright act, without any reciprocal rights or advantages whatever in favor of our own authors and artists.

The argument for the plaintiff rests wholly upon the use of the word "proprietor" in the authorizing clause (section 86) of the act of 1870. But the history of the use of the term "proprietor," ever since the act of 1790, shows that it has always been used in the copyright laws in the limited and restricted sense of a person who by purchase or otherwise has lawfully acquired the exclusive rights of some native or resident author or artist, and in no other manner.

By section 1 of the act of 1790 the right to obtain a copyright is granted to a resident author upon *his* works, or to a resident, or to any other person being a *citizen or resident*, "who has *purchased* and legally acquired the copyright of any *such* work," or the executors, administrators, or assigns of such persons. Section 2 imposes a penalty for publishing, etc., "without the consent of the author or proprietor." The same expression, "author or proprietor," is again several times used in sections 2, 3, and 4 of that act. Thus, in this early act, the term "proprietor" is used to embrace all the persons except the original author himself who by section 1 might obtain a copyright, viz., the author's executors, administrators, or assigns, or any person who had "purchased or legally acquired the copyright." By section 1 it is seen, moreover, that the purchasers referred to are the purchasers of "*such* map, chart, book, or books;" *i. e.*, of the works of *resident* authors only. It is the same in all the subsequent statutes above cited.

From the act of 1790 down to 1870 there could be no "proprietor," in the sense of the copyright law, except the owner of the work of a citizen or resident author, including a transfer of such resident's right of copyright.

In the case of *Keene v. Wheatly*, 9 Am. Law Reg. 33, *Cadwallader, J.*, says, (page 45:) "The other sections concern copyright. They apply only to authors who, if not citizens, must be residents of the United States, and proprietors under derivations of title from *such* authors. No other proprietor can obtain a copyright under the act." A third person may become such an owner or "proprietor" through a transfer or assignment, verbal or written, embracing the right of copyright, after the work is completed, or by virtue of an original employment under a contract with the author, which, by agreement, is to confer upon the employer the complete ownership both of the work itself and of any copyright that may be obtained thereon. Upon

such a contract "the person who remunerates," says the Vice Chancellor J., in *Grace v. Newman*, L. R. 19 Eq. 623, "must be taken to be the equitable assignees" of the copyright. *Parton v. Prang*, 3 Clif. 537, 547, 551; *Boucicault v. Fox*, 5 Blatchf. 87; *Little v. Gould*, 2 Blatchf. 362; *Sheldon v. Houghton*, 5 Blatchf. 285; *Paige v. Banks*, 7 Blatchf. 152; 13 Wall. 608; *Drone*, Copyright, 238, 243-5, 257-9.

To a mere owner of a work as such, to a "proprietor" in that sense only, without any express or implied transfer from the author or inventor of his right to a copyright, congress, as above observed, is not by the constitution vested with the power to grant a copyright. Congress is not, indeed, prohibited from protecting foreign authors and artists, if it choose to do so; but, in view of its inflexible refusal to do so up to this time, the phraseology of the statute of 1870, in section 86, is not to my mind a sufficient indication of any such change of purpose. When, therefore, in the act of 1870, the word "proprietor" is found used, for the first time, in connection with the words "author, inventor, designer," as a person to whom copyrights may be granted, it must be construed, if possible, in harmony with the inflexible policy and intent of the copyright law up to that date, and be held to be used in the same sense in which the word had always before been used in the copyright law of this country, viz., as meaning the lawful owner and representative, whether by assignment, employment, death, or other lawful succession, of the exclusive rights of some native or resident author or artist only. It must be construed in harmony with the policy of the copyright law, rather than upon its literal and independent reading. Upon the same principle the supreme court, in the late case of *Wilmot v. Mudge*, 103 U. S. 217, 220, held that the literal reading of an amendment of the section of the bankrupt law, as to the effect of a discharge of a fraudulent debt by a composition, must give way to the manifest general purpose and intent of the act. In that case the court says:

"It is conceded that the defendants in error came within the terms of this provision, and it is insisted that they must be bound by the composition. We admit the apparent force of the logic. But, as we have already said, these several statutes, sections, and provisions are to be construed as parts of one entire system of bankrupt law. * * * There is no injustice nor any difficulty in restraining the language of the composition section, as regards its binding force, to persons whose debts are capable of being discharged by the bankrupt law. * * * In this manner both provisions of the bankrupt law can stand and be consistent."

Upon the same principle the word "proprietor" should be construed so as to produce a harmonious rather than a contradictory policy in

the different parts of the copyright law, by giving that word the restricted meaning and sense in which it has been used in all the past copyright acts of this country. As respects this chromo, the plaintiff was not a "proprietor" of a native work, and, upon the construction here given, he was not, therefore, a "proprietor" within the meaning of section 4952, even had he shown an exclusive right from the foreign artist, and he is therefore not entitled to the benefits of the copyright law in this chromo.

3. The chromo in question is nothing but a lithographic *print* in colors. Lithographs were undoubtedly embraced in the term "print" under the act of 1831, both in the authorizing and the restricting clauses. 4 St. at Large, p. 436, §§ 1, 8. The only difference between chromo-lithographic prints and other lithographs is that the former are printed from several stones, namely, one for each color, while the latter are printed from one stone, with ink of some kind. It cannot be contended that a "print" is any the less a "print" because struck off in different colors; and it has been held that playing cards printed in colors are "prints." *Richardson v. Miller*, 3 Law & Eq. Rep. (Am.) 614. A print is "a mark or form made by impression or printing; anything printed; that which, being impressed, leaves its form, as a cut in wood or metal, to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book; an impression from an engraved plate; a picture impressed from an engraved surface," etc. Webst. Dict.; Worces. Dict.; *Wood v. Abbott*, 5 Blatchf. 325. "It means, apparently, a picture; something complete in itself, similar in kind to an engraving, cut, or photograph." *Rosenbach v. Dreyfuss*, 2 FED. REP. 217, 221.

Chromo-lithographs were therefore copyrightable as "prints" under the act of 1831, and as such were within the restriction of section 8 of that act. As chromo-lithographs became largely dealt in, and, under the slang name of "chromos," became a considerable article of trade, it was not unnatural that for greater certainty they should be mentioned by name in the revision of the copyright act of 1870. But congress did not thereby abolish the restriction which already existed upon copyrighting them when made by alien artists, because such chromo-lithographic prints are included in the word "print," which is contained both in section 103 of the act of 1870, and in section 4971 of the Revised Statutes. Under that general designation of "prints," being restricted before, they are restricted still; for in the use of the new and specific word "chromo" in the act of 1870, and in section 4952 of the Revised Statutes, there is nothing

incompatible with the restriction under the more general word "print," which both statutes continue in force as before. *U. S. v. Sixty-five Terra Cotta Vases, etc.*, 10 FED. REP. 880.

The preliminary injunction should therefore be denied.

GILLETTE and others v. BATE REFRIGERATING Co.

(Circuit Court, D. New Jersey. February 21, 1882.)

PRACTICE—REHEARING—NEWLY-DISCOVERED EVIDENCE.

To entitle parties to a rehearing, after an interlocutory decree, on the ground of newly-discovered evidence, they must show to the satisfaction of the court that they exercised due and reasonable diligence before the hearing to procure the evidence now sought to be introduced, and the facts and circumstances constituting such diligence must be specifically stated; a general averment is not sufficient. They must show, also, that the new evidence is material. The proper practice suggested.

On Petition for Rehearing.

John R. Bennett, (with whom was *Geo. Harding*,) for defendants.

Dickerson & Dickerson, for complainant.

NIXON, D. J. On the fourteenth of November, 1881, an interlocutory decree was entered against the defendants in the above case in favor of the complainant corporation, and a reference made to a master to take an account and report the gains and profits which had accrued to the defendants, and to ascertain the damages which the complainant had sustained by reason of the infringement of their letters patent. An application is now made for leave to vacate the decree, to amend the answer, to put in the newly-discovered evidence set forth in the accompanying affidavits, and for a rehearing of the cause. The complainant has demurred to the application, and alleges as grounds of the demurrer:

- (1) That the alleged anticipatory uses are immaterial to the case; and—
- (2) That if material the facts as to them were easily accessible to the defendants, and could have been proved prior to the former hearing.

When the case came on for argument the solicitor for the petitioners produced in court a stipulation signed by the solicitor for the complainant, conceding—

- (1) That the evidence which the defendants now seek to introduce was unknown to them until after the entering of the decree in the cause, and was first known to them on December 9, 1881, when disclosed in opposition to a

motion for injunction in the case of these complainants against Toffey and others, before his honor, Judge Blatchford.

(2) That the defendants expended a considerable sum of money in preparing their defence and obtaining such evidence as they produced at the hearing, and that they then produced all the information or evidence, touching the subject-matter of the suit, of which they then had no knowledge.

(3) That the new evidence is not cumulative or corroborative of any of the original proof of this cause.

(4) That the defendants, and each of them, would swear, viz.: "that the omission on their part to produce at the hearing the new evidence now sought to be introduced was not due to any neglect on their part, they having made diligent effort, extensive and thorough investigation and research, to obtain all evidence relating to or in any way bearing upon the subject-matter involved in this cause; that they have been diligent in producing this evidence since it has come to their knowledge, and in making this application; and that they believe this new evidence to be material, and that had it been before the court on the former hearing it would have changed the conclusion of the court, and resulted in a decree dismissing the bill of complaint,"—which statements are to be considered with the same force and effect as though sworn to in the form of an affidavit by the defendants, and each of them.

It was further stipulated that the respective parties might use, on this motion, copies of any affidavits which they deemed material, notwithstanding the fact that such affidavits may have been made or entitled in some other case, provided the originals of such affidavits be duly filed in the proper court in which they are entitled. This application is a proceeding now well recognized in the practice of courts of equity, and if allowed must be accompanied by such proofs and statement of facts as are deemed necessary to authorize the party to file a bill of review, or the court to grant leave to file a supplemental bill in the nature of a bill of review.

The case of *Baker v. Whiting*, 1 Story, 218, came up on a petition presented by the defendants, after an interlocutory decree, asking for a rehearing, and for leave to introduce newly-discovered evidence in the cause. Judge Story, after very full investigation, found precedents for such a practice in the courts of equity both of England and the United States; but held that where a rehearing was sought on the ground of new evidence, after an interlocutory decree, the court might grant the rehearing upon the filing of a supplemental bill, if the evidence was of such a nature and character as to entitle the party to relief upon a bill of review, after the enrollment of a final decree, or on a supplemental bill in the nature of a bill of review where there had been no enrollment, but not otherwise.

A like petition being subsequently filed in *Jenkins v. Eldredge*, 3 Story, 299, the same learned judge, in considering the case, said: "The present application, if maintainable at all, should properly, in its prayer, be for leave to file a supplemental bill to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should also be ready for hearing." The subject is thus generally alluded to in order to suggest the proper mode of proceeding in such cases; but there will be no difficulty in adjusting this application to meet the requirements of orderly practice, if it is found upon inquiry that the defendants have entitled themselves to open the case and to submit the newly-discovered evidence. Whether they are entitled depends upon the answer to two questions: (1) Have they shown that they exercised due and reasonable diligence before the hearing in procuring the evidence now sought to be introduced? (2) Is the new evidence material in determining the issues raised by the pleadings?

1. In regard to the first question the burden is upon the defendants to show that the omission to produce the testimony was not due to any negligence on their part, and that they were diligent in their efforts to obtain it. *Reeves v. Keystone Bridge Co.* 9 O. G. 885. No relief of this nature can be granted where the party seeking it could, by proper diligence and inquiry, before the decree have obtained knowledge of the existence of the new evidence. *Rubber Co. v. Phelps*, 8 Blatchf. 87; *Ruggles v. Eddy*, 11 Blatchf. 524; *Page v. Telegraph Co.* 2 FED. REP. 330.

Nothing has been laid before the court exhibiting any diligence or care on the part of the applicants in procuring the testimony before the hearing of the cause, and no facts have been suggested from which I may properly infer its exercise. I do not overlook the fact in the stipulation filed, the complainant has admitted that the defendants would swear that "the omission to produce the new evidence was not due to any neglect on their part, and that they made diligent effort, and extensive and thorough investigation and research, to obtain all evidence relating to or in any way bearing upon the subject-matter involved in the cause."

But suppose the defendant made such an affidavit, what then? The statement is merely conclusions of law that interested parties have drawn from facts and circumstances which they do not disclose, and which, if known, might possibly lead the court to different conclusions. Courts always claim the right to hear the facts and circumstances and draw their own inferences.

2. Looking at the construction given to the complainant's patent, (see 9 FED. REP. 387,) there is reason to deem the new evidence, if true, to be material. But I have not looked into the second inquiry with any care, as I am clearly of the opinion that the defendants have not made sufficient proof of diligence under the first head to entitle them to have the case reopened.

The application is refused.

HOE and another v. KAHLER.*

(Circuit Court, S. D. New York. March 27, 1882.)

1. PATENTS FOR INVENTIONS—IMPROVEMENT IN PRINTING PRESSES—CONSTRUCTION OF.

The third claim of letters patent No. 131,217, granted Richard M. Hoe and Stephen D. Tucker, September 10, 1872, for "separating two following sheets of paper, in their travel to the fly frame, into two different paths, by an arrangement of tapes and switches, and making the travel of one sheet suitably longer than the other, so that when they meet again they will issue one upon the other to the fly," *held* to be valid, and construed to cover an arrangement of tapes and switches which attains such result either by the divergence of such sheets into two paths, each different from the original line of travel, by means of double-acting switches, or by the continuing of one sheet in its original path and the diverting of the other into a separate path by single-acting switches.

2. SAME—OATH TO CAVEAT—JOINT INVENTION—ADVICE OF COUNSEL.

The filing of a *caveat*, with an affidavit by a single individual that he believes himself to be the first original inventor, does not preclude the subsequent procurement of a patent for the improvement described in the *caveat* as the joint invention of himself and another, where such original affidavit was made under advice of counsel and a miscomprehension of the facts.

In Equity. Final hearing.

M. B. Philipp and B. F. Thurston, for plaintiffs.

B. F. Lee and W. D. Shipman, for defendant.

BLATCHFORD, C. J. This suit is brought on letters patent No. 131,217, granted to Richard M. Hoe and Stephen D. Tucker, September 10, 1872, for an "improvement in printing presses." Infringement is alleged of only claims 3 and 4 of the six claims, and only those parts of the specification need be referred to which concern claims 3 and 4. The specification says that the invention "relates to printing machines, and more particularly to that class commonly known as perfecting presses, in which the sheets of paper are printed on both sides in passing once through the machine. It consists in certain

*Reported by S. Nelson White, Esq., of the New York bar

novel combinations and arrangements of parts to be more fully described hereafter, which have for their object the more perfect operation of the machine in presenting the sheets of paper to the printing mechanism and conducting them away after being printed." There are six figures of drawings, of which only figures 4 and 5 are important to the present suit. The specification says: "The sheets of paper to be printed are carried to and away from the printing mechanism by the series of tapes, *a, b, c, d, e, f, g, h, i*, shown in detail in figures 4 and 5." Then the printing mechanism is described, which prints both sides of each sheet, and the means of conveying the sheets to and through such mechanism. Then the text proceeds:

"The sheets, after leaving the printing mechanism, are carried between the tapes, *e, f*, up to the rollers, 61, 62, where, by an arrangement of tapes and switches, they are alternately directed into different paths. The tapes, *g* and *h*, run in contact with the tapes, *e, f*, after they diverge at the rollers, 61, 62, and they act to carry the sheets forward after they leave the tapes, *e, f*. The tapes, *g*, pass around the roller, 63, horizontally, a short distance in contact with the tapes, *f*, and thence around the roller, 69, to the roller, 63, again; and the other series, *h*, pass from the roller, 60, upward and in contact with the tapes, *e*, to and over the roller, 59, beneath the tapes, *e*; thence horizontally to the roller, 58; and thence to and around the roller, 70; and, finally, in a horizontal direction to the roller, 63, and over it to the roller, 60. These tapes convey the printed sheets to the flying mechanism as they are directed by the switches, 72. The printed sheets, as they leave the tapes, are received by two separate fly-frames, R, S, and laid by them upon two separate tables, P, Q; and, through the arrangement of the tapes before described, and the operation of the switches, 71, 72, two sheets are presented at the same time, one upon the other, and taken by the fly. The switches, 72, act to direct the sheets into different paths, and the switches, 71, act to direct their passage to the fly-frames. As the sheets are fed in one after the other from the tables, T, U, V, W, it is necessary to make some take a longer path than the others in order to have two of them issue together at the same time from the tapes to be taken by the fly-frames, and for this purpose the switches, 72, are employed and operated as follows. * * *

Then follows a description of means for operating the switches, 72, and of means for operating switches, 71, and the fly-frames, R, S; the fly-frames being alternately raised and lowered, one being up while the other is down. The text then goes on:

"In conducting the sheets from the last printing cylinder to the flying mechanism between the tapes, they follow one immediately behind the other as they are fed from the tables, and it is necessary, as before stated, to make the first and third sheets travel a longer path than the second and fourth, in order to cause two sheets to issue simultaneously and lie one upon the other when taken by the fly-frame. As the first sheet, therefore, approaches the rollers, 61, 62, the switch, 72, is turned into the position shown in figure 4, so

that the sheet, in its travel upward, strikes against the curved edge of the switches, 72, is directed by them between the rollers, 60, 61, and the tapes, *e, h*, and thus caused to travel between these tapes over the rollers, 59, 58, while, as the edge of the second sheet approaches the rollers, 61, 62, the switch is turned back into the position shown in figure 5, so that the sheet will be directed by it between the rollers, 62, 63, and caused to enter between the tapes, *f, g*, and be carried by them in a shorter path to the point where they issue to the fly. The third and fourth sheets are acted upon by the switches, 72, in the same manner, and one caused to take a longer path than the other, and so on for the following sheets. Two printed sheets are thus brought out on the fly-frame by being separated in their courses after they leave the printing mechanism into two different paths, and being brought together again, so that when they meet they will issue one upon the other. The roller, 59, is held in adjustable bearing, 80, secured to the side-frames, C, and can be raised or lowered to make the path of the first sheet longer or shorter, as it may be necessary. The machine is provided with two separate fly-frames and receiving tables, placed back to back for the purpose of causing the sheets, when thrown upon the tables, to have one side exposed to view on one table and the other side in view on the other table, so that both printed sides are in sight at the same time for inspection. In delivering the double sheets to the fly-frames they are directed alternately to each fly by the switches, 71, which vibrate between the rollers, 57, 68, and issue in front of the fly, S; but, as the edges of the next two sheets approach the switches, 71, they will be turned in the other direction, figure 5, and caused to direct the sheets into the path between the rollers, 66, 67, so that they will issue in front of the fly, R, and be laid upon the table, P."

Claims 3 and 4 are as follows:

"(3) Separating two following sheets of papers, in their travel to the fly-frame, into two different paths, by an arrangement of tapes and switches, and making the travel of one sheet suitably longer than the other, so that, when they meet again, they will issue one upon the other to the fly, substantially in the manner described and specified. (4) The employment and use of the adjusting roller, 59, for regulating the travel of the first sheet, constructed and operating substantially in the manner described and specified."

Claim 3 is for an arrangement of tapes and switches which separates two following sheets of the printed papers, in their travel to the fly-frame, into two different paths, the travel of one of the two sheets in its path being suitably longer than the travel of the other of the two sheets in its path, so that, when the two sheets meet again they will issue one accurately superimposed upon the other to the fly. Each sheet follows the line of travel of its controlling tapes. Sheets 1, 3, 5, and so on, in numerical order, go the longer path, and sheets 2, 4, 6, and so on, in numerical order, go the shorter path, so that sheet 1, starting before sheet 2, may yet arrive at the same time with it, and

the two issue in unison one upon the other, and so with sheets 3 and 4, and sheets 5 and 6. Two sheets are thus delivered at one and the same time to one fly-frame, and then two others are delivered at another and the same time to the other fly-frame.

The defendant's apparatus has no fly-frame. The sheets on it issue in pairs to a folding apparatus. It also has single-acting switches, instead of double-acting switches, at the point where the longer and shorter paths take their departure, and it has no switches, 71. If the fly-delivery devices, and the switches, 71, and the double-acting switches, as distinguished from the single-acting switches, are no part of claim 3, then the infringement is clear. In the defendant's machine the printed sheets are successively carried by the same sets of tapes to a place of divergence, where there are single-acting switches, along the edge of the sheet. When the switches are out of the way the sheet passes on in a path which is a continuation of its path up to the switches. When for the next sheet the switches are interposed, that sheet is diverted into another path. Then the switches move out of the way again and the first operation is repeated, and so on,—the switches moving into the way and out of the way alternately for each alternate sheet. One of the paths is suitably longer than the other, so that, when the two paths meet again, the sheets coincide, and one is upon the other and they issue in pairs. The question of the infringement of claim 3 depends, therefore, mainly upon the proper construction of that claim.

The object of the invention in claim 3, as indicated by the text of the specification, is to carry along the sheets in succession and divide them into two series, each series consisting of all the alternate sheets, and to cause a sheet of one series and the following sheet of the other series to be brought together in pairs, surface to surface with coinciding forward edges, and thus be delivered ready for the next operation that is required. In the plaintiffs' patent a fly takes them. In the defendant's apparatus, they pass on and are mechanically folded, the two sheets at a time. In the plaintiffs' patent the use of the two flies makes necessary the switches, 71, to direct each successive pair of sheets to a different fly. But there is nothing in claim 3 which refers to any operation that is to be performed upon the sheets after any successive two sheets are made thus to coincide and be superimposed. The separation into two paths, the longer and the shorter travel, the meeting, and the issuing one upon the other, are all there is that is made essential either by the description or the claim. It is true that the travel is to the fly-frame, because

there is a fly-frame, and that the fly takes the pair of sheets when they issue, because there is a fly. But the invention of separation, travel in paths of different lengths, and uniting and issuing one upon the other, has no relation to and does not include the fly-frame or the switches, 71, nor does claim 3 include them. The word "switches," in claim 3, cannot be construed to include the switches, 71, without distorting the language of the claim. The switches, 71, take no part in separating two following sheets of papers in their travel to the fly-frame into two different paths, one longer than the other. The switches, 71, act upon the sheets after they have left their different paths and have come together again, one upon the other, and act upon them only as pairs, and have no action to make pairs of them.

A determination as to whether the switches, 72, shall be single-acting or double-acting is controlled entirely by the fact as to whether the original path is to proceed on from where the switches are located in a continuation of the same line, as a path for one of the sheets, leaving the other sheet of the pair to be diverted by the switches into another path, or whether the original path is not to proceed on in the same line; but there are to be two new paths, each controlled by a separate movement of the switches. In the former case the switches keep out of the way to permit the original path to continue on and continue open as one path, and then come into the way to create the second path. In the latter case the switches come into the way to divert one sheet from its original line into one path, and then come into the way to divert the second sheet from its original line into another path. There is no difference in principle between the switching arrangement in the two cases. The change is purely mechanical, depending on the courses the sheets are to take with reference to the path by which they approached. The single-acting switches direct the travel of the sheet out of whose way they keep, relatively to the path of the other sheet, as effectually as they direct the path of the latter relatively to that of the former, by being interposed in the way.

On the twenty-fourth of January, 1854, Mr. Hoe filed in the patent-office a *caveat* which described the invention covered by claim 3, and illustrated it by drawings in a manner sufficiently full and clear to have enabled the apparatus to be built and put in practice. The affidavit to the *caveat* was sworn to by Mr. Hoe February 24, 1854, and was filed in the patent-office February 27, 1854. In that affidavit Mr. Hoe swears that he verily believes himself to be the original and first inventor of the improvement. This *caveat* was re-

newed October 4, 1860; September 18, 1861; October 9, 1862; September 16, 1863; August 22, 1864; October 5, 1865; October 5, 1866; October 3, 1867; October 7, 1868; and October 5, 1869. The patent in suit was applied for April 4, 1872. The evidence of Mr. Hoe and Mr. Tucker is entirely conclusive to show that they were the joint inventors of what is embraced in the patent, and that Mr. Hoe was not the sole inventor. Notwithstanding the affidavit to the *caveat*, the fact of joint invention is clear. Moreover, the evidence shows that the affidavit was true, and that Mr. Hoe did, at the time he made it, believe himself to be the original and first inventor of the improvement. All that Mr. Hoe swears to is his belief. It is shown that he had such belief; that he told Mr. Tucker at the time that he had such belief; that he was advised by counsel that notwithstanding he and Mr. Tucker mutually produced or invented what was in the *caveat*, yet their relations as employer and hired employe made the invention the property of the employer, and authorized the taking of the *caveat* in the name of the employer alone; that he told Mr. Tucker of such advice at the time; and that Mr. Tucker concurred in what was done. With this explanation there is nothing connected with the *caveat* to interfere with the validity of the patent, or to prevent the carrying back of the invention claimed as a joint invention to the date of the original filing of the *caveat*. The *caveat* having been filed as for an invention of Mr. Hoe alone, he could have no motive, nor could there be any advantage, in the joint application for the patent as for a joint invention, except that it was true that the invention was in fact joint, and that the advice he had received before the time the *caveat* was filed had been modified by different advice received, on full consideration of all the facts, when a patent was to be applied for. The impulse of self-interest would naturally be to disregard the truth, and thus avoid any necessity for explaining the apparent discrepancy between the affidavit to the *caveat* and the affidavit to the application for the patent. Both Mr. Hoe and Mr. Tucker testify fully and without reservation, and disclose fully all the facts and all the motives which induced the action taken. There is nothing to impeach their truth or credibility. The question is as to what Mr. Hoe and Mr. Tucker believed at the time. The question is not as to whether the advice of the counsel was correct on the facts presented to him. Exactly what facts were presented to him cannot now be told. The matter was oral. Whether all the facts, as now disclosed, were presented to him, we cannot tell. The evidence shows that the same counsel who gave the advice afterwards, and with

reference to taking out a patent for the joint invention of Mr. Hoe as employer and Mr. Tucker as his employe, advised that there was a question as to the propriety of taking out such patent in the name of the employer alone, and that it was wiser to take it out in their joint names. This goes to confirm the fact that the original advice was given. Mr. Hoe, as a layman, had a right to act upon it, and to swear to his belief. This he did.

In the contents of the file wrapper in the matter of the patent, is an oath, sworn to by Mr. Hoe, March 12, 1872, at London, England, before "J. Nunn, a London commissioner, to administer oaths in common law," the official character of Mr. Nunn being authenticated by a certificate made by the consul general of the United States at London. No other oath by Mr. Hoe to the specification or application appears among the contents of the file wrapper. There is a proper affidavit by Mr. Tucker that he verily believes himself to be the first, original, and joint inventor with Mr. Hoe, and as to the other particulars required. The form of the oath by Mr. Hoe is not criticised, but it is objected that the oath was not taken before a proper officer, and so there was no oath by Mr. Hoe, and no valid patent. The contents of the oath were prescribed by section 30 of the act of July 8, 1870, (16 St. at Large, 202.) That section provided that the oath might be made "before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, charge d'affaires, consul, or commercial agent holding commission under the government of the United States, or before any notary public of the foreign country in which the applicant may be."

The bill alleges that the plaintiffs obtained letters patent for their invention "in due form of law." It alleges nothing as to any oath or as to any application, except to say that they obtained the patent "upon due application therefor." The answer does not aver any defect in Mr. Hoe's oath, or any want of an oath, but alleges merely that the defendant "is not informed whether, in other respects, the requirements of law relative to the granting of letters patent were complied with by the said Hoe and Tucker, or what, if any, proceedings were had prior to the issue of said letters patent, and therefore denies the allegations of the bill of complaint in respect to the same, and leaves the complainants to make such proof thereof as they may be advised." The plaintiffs sustain whatever *prima facie* burden there was upon them because of the averment as to "due application" by introducing the patent. The plaintiffs did not put in evi-

dence the file wrapper and contents. They were put in evidence by the defendant under the objection by the plaintiffs that they were incompetent, irrelevant, and immaterial. There is no disclosure in the record of any point being made by the defendant as to a defect in Mr. Hoe's oath, or as to the want of an oath by Mr. Hoe. The plaintiffs had put the patent in evidence without any objection being taken by the defendant that it was not properly granted, because there was no proper oath. There is no evidence put in by the defendant to rebut the presumption, from the grant of the patent, that there was a proper prior oath by Mr. Hoe tending to show that there was no such oath by him, or that the oath appearing was the only oath he made. The copy of the file wrapper and contents is a copy certified January 9, 1881, and speaks only as to what were the contents of the file wrapper on that date. The papers are not evidence to show that there was not a proper oath by Mr. Hoe other than the one referred to, even if that were an improper one. They were not competent or relevant to show the want of an oath. The patent recites that the plaintiffs "have complied with the various requirements of law in such cases made and provided," and, "upon due examination made," they are "adjudged to be justly entitled to a patent under the law." Section 26 of the act of 1870 provides that the inventor must make application in writing to the commissioner of patents for the patent. Section 30 provides for the oath to be made by the applicant. Section 31 provides that "on the filing of any such application, and the payment of the duty required by law, the commissioner shall cause an examination to be made of the alleged new invention or discovery; and if, on such examination, it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor." Assuming that it is open to a defendant, on pleadings such as those in this case, or in any case, to defend a suit on a patent for infringement by setting up and showing a defect in, or a want of, the preliminary affidavit, when a patent is issued containing such recitals as that in this case,—a question not now necessary to be considered or discussed,—it is very clear that the defendant in this case does not show the existence of such defect or want by any competent evidence.

It remains to consider the Campbell machine on the question of novelty as to claim 3. It is clear that Hoe and Tucker made the invention before Campbell did, and clearly described it in the *caveat* and drawings filed in 1854. No press containing the invention of

claim 3 was made before 1871, because a printing press of the kind and capacity shown in the *caveat* is a structure of large cost, not to be made with the chance of a sale, but only to be made on an order, of a particular size, for a particular newspaper. On the twenty-first of April, 1871, an order for the press was received from the *Daily News*. By December, 1871, the machine was built and set up and successfully worked in the factory of Mr. Hoe, embodying claim 3. It was then taken down and was put up in the *Daily News* office, and worked there in February, 1872. Although the Campbell delivery apparatus is alleged to have been constructed early in the fall of 1871, tapes were not applied to it, nor were the switches or the mechanism that operates the switches applied until January or the first of February, 1872, in Ayer's factory at Lowell. The delivery apparatus was not set up, nor were sheets of paper run through it, before that time. Therefore, priority of completion of mechanism, as well as priority of invention, must be determined in favor of the plaintiffs.

Claim 4 is a claim to the adjusting roller for regulating the travel of the first sheet, in its longer path, relatively to the travel of the second sheet, in its shorter path. It thus involves the two several series of tapes of the two several paths. The adjustment of the relative lengths of the two paths to each other, by modifying the length of the longer one, though an adjustment of the roller acting on the longer tapes, is the point of the claim. The defendant's expert says that the English patent to Dryden and Miles does not contain any description of the apparatus relied on; and that the drawing alone is imperfect, and is not a sufficient description to invalidate claim 4. The plaintiffs' expert says that the roller of Dryden and Miles does not act on one set of tapes alone, but varies the lengths of two sets of tapes simultaneously, and to substantially the same extent.

The defendant's expert says that the Dryden press at Gray & Green's exhibited the invention in claim 4, but he gives no reason for so thinking. The plaintiffs' expert says that that press had only one set of tapes, and had no method of adjustment by which the travel of one sheet could be adjusted relatively to the travel of another and following sheet; and that the adjustment of the roller in it adjusted the travel of the same sheet, relatively to forms of types which printed the two sides of it, so as to make the impressions register. This is not the invention of claim 4.

There must be a decree for the plaintiffs as to claims 3 and 4 with costs.

HAYES v. SETON.

(Circuit Court, E. D. New York. April 26, 1882.)

1. REISSUE—VOID FOR VARIANCE FROM ORIGINAL.

Reissue 8,597 *held* void, being for a different invention than that of the original.

2. SAME—VOID FOR CLAIMS TOO BROAD.

Reissue 8,774 *held* void, the claims sued on being broader than the claims of the original, and for matter not claimed in the original reissue, 8,675. Claim 1 *held* to be either limited by the specification, or broader than the original, and being so limited is the same as claim 2, which is not infringed by defendant's structures. Claim 6 *held* not infringed by defendant's structures.

3. SAME.

Reissue 8,688. Claim 1 void, being broader than the original. Claim 2 not infringed by defendant's structure, which is more like anticipating device of Duisch English patent. Claim 3 is void because it omits one element claimed in this combination in the original. Claim 5 broader than original, and void.

4. SAME—NOT AN INFRINGEMENT.

Reissue 8,689 not infringed by a sash having only a single flange. Case of *Miller v. Bridgeport Brass Co.* commented on and followed.

J. H. Whitelegge, for complainant.

G. G. Frelinghuysen, for defendant.

BENEDICT, D. J. This action is founded upon five patents for various inventions employed in the construction of sky-lights, conservatories, and other glazed structures. Infringement of these patents is denied, and the validity of each of the reissues is contested upon the ground that the reissue is not for the same invention as that described in the original patent, and the further ground that it was illegally issued.

The first patent set forth in the bill is reissue No. 8,597, dated February 25, 1879. The original patent, No. 94,203, put in evidence by the defendant, was issued in 1869. In it the invention is stated to consist of a metallic ridge-box, capable of being used as a ventilator, "so constructed as to admit of an ingress of pure air, which, coming in contact with the impure air of the building, is driven into an upper cavity, which, being perforated, gives the egress; the whole arranged so that all leakage is avoided." The method of constructing this ridge-box is set forth in the specification, and a drawing connected therewith. The drawing represents the rafters of a building, resting against two ridge-boards, separated so as to leave an opening from the inside of the building, between the ridge-boards. Over this opening, and upon the outside of the roof, is a box or frame, G, perforated at its lower edge so as to admit the outside air to the interior

of the box, and having a flange outside of its junction with the roof to prevent leakage between the roof and the box. Across the top of the box is a grating, 5, for the passage of air from the interior of the box into a cap, I, constructed so as to cover the top of the box. This cap extends beyond the sides of the box, and is then perforated to permit the egress of air from the cap. Upon the grating rests a slide, K, perforated to act with this grating so as to open or close the same when desired. The single claim of this original is as follows: "The metallic flange, F, the frame, G, the grating, J, the slide, K, and the cap, I, constructed and arranged, substantially as shown and set forth, for the purposes set forth." The invention described in this patent, and sought to be secured thereby, is a simple box, intended to act as a ridge, and at the same time serve as a ventilator by allowing air from the outside of the building to enter the box, and there mingling with the inside air, then to pass up through the box into the cap, and so out by perforations in the cap, as described. If now, the reissue be examined, it is observable that a feature, nowhere alluded to in the original patent, has been inserted, namely, a plate running up inside of and parallel with the sides of the box, and connecting at its foot with the flange outside the box. This inside plate is termed, in the reissue, "an interior vertical flange," and its function is stated to be to form an air space or flue around the frame on the inside. This is a feature wholly new, and in the reissue it is made an essential part of the invention by the terms of the specification of the reissue. It is also made a necessary element in each claim of the reissue by reference to the drawings and the specifications. By the addition of this new element a substantial change in the structure claimed to have been invented is effected, and as there is nothing in the original patent upon which a right to this new structure can be based, the reissue must be held to cover an invention different from that described in the original, and for that reason void.

The next patent set forth in the bill is reissue No. 8,674, dated April 15, 1879. The validity of this patent is also disputed. The original patent described a metallic bar or rafter intended to be used in the construction of glazed roofs. The construction of this rafter is particularly set forth. Its characteristic features are a short metal body, *a*, a stay-plate, *f*, a hollow moulding, *d*, the same being fitted together and arranged so as to form, on the upper side of the rafter, rabbets, *b, b*, for the glasses to rest on, and on the under side gutters, *c, c*, to catch the drip. No one of the characteristics of this rafter is

claimed to have been first invented by the patentee. But he claims to have been the first one to employ them in the manner described, and thereby to have invented a rafter which is new in form and useful in result. The original patent also describes a form of cap-plate to be fastened to the upper side of the rafter above the rabbets, between which and the ledge of the rabbet the glasses are to rest. No new result is claimed to have been attained by the use of this cap-plate, but the combination of the cap-plate with the rafter described is alleged to be new and useful. The original patent also describes a form of metal clip constructed to form a lap under and over the adjacent edges of the glasses of a glazed roof, in a direction crosswise to the rafter, and extending so that each end is covered by the cap-plate attached to the rafter. There are three claims in the original patent:

(1) The metallic bar or rafter, A, formed of a hollow sheet-metal body, *a'* stay-plate, *f*, and hollow moulding, *d*, fitted together and arranged to form rabbets, *b, b*, for the glasses and gutters, *c, c*, substantially as specified. (2) The combination of the cap-plate, *d*, with the hollow metal bar or rafter, A, essentially as shown and described. (3) The clip, I, in combination with the cross gutters, *h*, the main gutters, *c, c*, substantially as specified.

This patent was reissued in 1873, and again in 1879, the latter reissue being the patent set forth in the bill. This last reissue has 15 claims, whereby the scope of the patent is largely extended. Of these the third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth are alleged to have been infringed. The invention described in the third claim of the reissue consists of a hollow sheet-metal rafter, having a body, *a*, similar to the body of the rafter described in the original patent, rabbets, *b, b*, similar to the rabbets on the rafter described in the original, gutters, *c, c*, similar to the gutters of the rafter described in the original, and a hollow moulding, *d*, similar to the moulding, *d*, of the rafter described in the original patent.

It will be perceived from the description that the subject-matter of the claim is a rafter differing from the rafter described in the original patent, in this, that it has no stay-plate, *f*. This stay-plate is, in the original, described as one of the characteristic and essential features of the plaintiff's invention. Its omission from the rafter described in the third claim of the reissue effects a substantial change in the combination, and therefore is fatal to the claim. The claim, as made, is for a different invention from that described in the original patent, and for that reason must be held void.

The fourth claim of this reissue is also illegal for the same reason. It covers a rafter differing from the rafter described in the original, in that it has no stay-plate, *f*.

The sixth claim of the reissue is for a hollow sheet-metal rafter having rabbets and gutters like those of the rafter described in the original patent, and also a cap-plate, *D*, attached. Both the moulding, *d*, and the stay-plate, *f*, which, in the original, are designated as essential features of the invention, are omitted from this claim, and a substantial change in the structure thereby effected. This claim, therefore, is also void, for the reason that it covers a rafter not to be found in the original patent.

The remaining claims of this reissue, alleged to have been infringed in every instance, are intended to enlarge the scope of the patent. And while it may be true in regard to some of them that the subject-matter of the claim is described or suggested in the original patent, it is evident, on the face of the patent, that there was no intention to assert that any of these matters formed part of the patentee's invention, and no intention on the part of the patentee to claim any exclusive right therein. Any person reading the original patent would be justified in the conclusion that no exclusive right to these matters was claimed by the patentee. Such being the case, according to the decision of the supreme court of the United States in *Miller v. Bridgeport Brass Co.*, 12 O. G. 667, it is the duty of this court to declare that any right which the patentee may have had to secure these matters by letters patent has been lost by delaying to assert such right for over nine years from the date of the original patent. Says the supreme court: "The claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed." This language is applicable to the present patent, and because due diligence was not used to rectify the omission, and to claim these combinations, this court is compelled, by the authority cited, to hold that these claims are invalid, and the reissue to that extent void.

The next patent set forth in the bill is reissue No. 8,675, dated April 15, 1879. To this reissue, also, the defence is set up that it is illegal and void. The original patent was No. 106,157, dated August 9, 1870. It relates to an improvement upon the rafter forming the subject of the patent No. 100,143, already referred to. The improvement is stated to consist in a novel arrangement of stay-plate in the rafter, whereby strength is secured without material addition to the

weight; and also to consist in employing a novel construction of end clip; and also to consist in an indirect arrangement of escape openings from the main gutters to provide for the escape of water, and prevent snow from beating in. A description of these improvements is given in the specification, with reference to drawings annexed.

The claims of the original patent are three in number, and are as follows:

(1) The arrangement of the vertical stay-plate, *a*, with the shell or body, *a*, of the rafter moulding, *d*, rabbets, *b*, *b*, and gutters, *c*, *c*, substantially as specified. (2) The clip, *G*, formed with corrugation, *b*, made to substitute gutters, and arranged and applied relatively to the glass as described. (3) The arrangement of the end outlets, *f*, *f*, with the hollow body of the lower transom, *F*, escape apertures, *g*, substantially as specified.

These claims, it will be observed, are—*First*, for a rafter constructed in a certain way; *second*, for the use of a clip of a certain form when applied to the glasses of a glazed roof in the manner described; and, *third*, for the arrangement of outlets for the water to escape from the gutters by outlets under cover of the lower transom, and then by apertures in the end clip at the foot of the roof, arranged intermediate the outlets from the gutters. The elements of these combinations are all old; the combination of elements is what is claimed to be new.

The reissue has seven claims, of which the first, second, and sixth are alleged to have been infringed by the defendant. The first claim of the reissue, like the first claim of the original, is for the combination of the vertical inside plate with a rafter. But while the rafter in the original has a moulding, *d*, the rafter in the first claim of the reissue is described as having a high ridge, and no mention is made of the moulding, *d*, unless such mention be effected by the words "formed essentially as shown." If these words do not have the effect to constitute the moulding mentioned in the specification a part of the rafter and an element of the combination, then the claim is void because for a different structure from that described in the original. If, on the other hand, the words "formed essentially as shown," carry with them every feature of the rafter described, including a "sheet-metal moulding properly secured to the rafter or bar and inside plate, and so connected to the gutters of the rafter as to constitute a brace to prevent them closing together, or a clamp to prevent their spreading, or both," then the first claim of the reissue is for the same thing as that described in the second claim.

The second claim of the reissue appears to be for the same invention described in the original patent, and I therefore pass to the

question whether it has been shown to have been infringed by the defendant. In my opinion such infringement has not been proved. None of the bars or rafters made by the defendant have a moulding secured by rivets and bolts to the rafter or bar, and attached to the inside stay-plate by suitable bolts or rivets, so as to form a brace or clamp for the gutter. And this difference appears to me to take the defendant's structure out of the scope of the plaintiff's patent. But if the defendant's rafter be held to be similar in construction to the rafter described in the claim under consideration, then the claim must, in my opinion, be held void, for the reason that a rafter similar to the defendant's, in the features under consideration, is described in Bunnett's English patent of 1856.

The subject-matter of the sixth claim of this reissue is not found in the structures claimed to be infringing structures. In those structures there is but one set of openings, and those from the gutter directly to the outside.

The next patent set forth in the bill is reissue No. 8,688, dated March 14, 1871. Claims 1, 2, 3, and 5 are alleged to have been infringed.

The subject-matter of the first claim of this reissue differs from anything described in the original, No. 112,594, dated March 14, 1871, in that one essential feature of the structure claimed in the reissue is that it is "formed of one piece of folded sheet metal," and another essential feature is that the rafter has "an upward vertical extension forming a ridge." The rafter described in the original is there expressly stated to be formed of two sheets of metal, and the specifications nowhere allude to any "upward vertical extension." These differences have been insisted upon by counsel for the plaintiff as being important. Moreover, from this first claim of the reissue is omitted the under cap which in the original is made an essential feature. These alterations and additions introduced into the reissue, in my opinion, effect an alteration in the invention, and render the claim void, because for a different invention claimed in the original.

The second claim of this reissue is for "the hollow metallic bar or rafter, —, constructed substantially of plates, *a* and *c*, bent to support or connect each other, and to form gutters, *b, b*, arranged in juxtaposition to each other, and under cover of the base or bases which support the glass, as herein set forth."

In this claim, as in the original patent, mention is made of one feature of the invention, namely, that the gutters, *b, b*, are under cover of the bases that support the glass, so that the gutters offer little or

no obstruction to the light passing through the glass. This appears to be the distinctive feature of the rafter sought to be secured by this claim. But no such feature appears in the devices shown in Exhibit No. 11, opposite the marginal numbers 23 and 24, which are described as the infringing devices of the defendant. I am unable, therefore, upon the testimony, to find that this claim has been infringed, unless it be held that the construction of the gutters so as to keep them under cover of the bases is not an essential feature of the invention. But if it be so held, then I must hold the claim void for want of novelty; for the invention described in this claim, so understood, appears in the patent issued to Edward Duisch, August 26, 1848, set up in the answer and duly proved.

The third claim of reissue 8,688 covers a clip, *H*, constructed of sheet metal, bent to form a groove, *h*, and a rabbet, *i*, as set forth. The clip here described differs from the clip in the original patent in this, that a gutter, *k*, is in the original (see specification in second claim) made an essential part of the invention. In the specification of the reissue, and also in the third claim of the reissue, the gutter is made optional. The effect of this change is to expand the patent and bring within its scope a form of clip not described in the original. The claim must, for this reason, be held void.

The fifth claim of this reissue comes within the rule laid down in *Miller v. Bridgeport Brass Co.*, already referred to, and must be held void upon the authority of that case.

The fifth and last patent set up in the bill is reissue No. 8,689, dated April 29, 1879.

The third claim of this reissue is the only claim here in question. This claim is for "the swinging sash, *c*, provided with exterior and overlapping elastic flanges, *f*, essentially as described." No infringement of this claim appears in complainant's exhibit model of infringing sky-light, August 17, 1881. The defendant's swinging sash has only a single flange, forming an ordinary joint, without any exterior and overlapping elastic flange, such as described in the patent.

Upon these grounds the bill is dismissed, and with costs.

PUTNAM v. HUTCHINSON.

SAME v. HUTCHINSON.

SAME v. LOMAX.

(Circuit Court, N. D. Illinois. April 17, 1882.)

1. REISSUE—DISCLAIMER.

Where an application for a patent was rejected because of want of novelty, on reference to a prior invention, and on a reapplication it was granted because of a disclaimer by the patentee of certain claims made on the prior application, *held*, that a reissue to the assignee of the inventor, on claims including those disclaimed by the prior patentee, is invalid as to such claims.

2. SAME—ENLARGING CLAIM.

Where, on application for a patent, the examiner denied the application on the ground that he deemed certain claims anticipated by a prior device, it is not a "mistake or inadvertence" such as will entitle the assignee of the patentee to a reissue; the remedy in such cases is by appeal.

3. IMPROVEMENT IN BOTTLE-STOPPERS.

The first three claims in reissued patent No. 9,002, of original patent No. 156,302, for an improvement in bottle-stoppers, are invalid because too broad, including claims which had been disclaimed by the inventor on the original application.

J. P. Altgeld, B. F. Thurston, and A. von Briesen, for complainant.
West & Bond, for defendants.

BLONGETT, D. J. The complainant in these cases charges defendants with the infringement of reissued patent No. 9,002, issued to complainant on the twenty-third of December, 1879, (on application for reissue, filed October 30, 1879,) as assignee of Joel B. Miller, for an "improvement in bottle-stoppers," the original patent having been issued to Miller on the twenty-seventh of October, 1874, No. 156,302. The bill prays an injunction and an accounting in the usual form.

The original patent was for an internal bottle-stopper, with a handle or bail hinged to the stopper passing upward through the neck of the bottle, made staple-shaped, the upper end or top being formed into a loop large enough to prevent it from dropping into the bottle, the bail being made of steel wire or other elastic metal, so that the two legs of the staple or bail would form springs which pressed against the throat of the bottle. By this handle or bail the stopper could be drawn up into the throat, when it was desired to close the bottle, or pushed downward for the purpose of opening it, and the two legs of the bail pressing against the sides of the throat aided in holding the stopper in place.

In his application for a patent Miller claimed, broadly: "*An attachment to a bottle-stopper, by means of which a stopper inside the bottle may be operated to open or close the throat of the bottle, substantially as shown and described.*" This claim was rejected by reference to the patent of Parkhurst. Amended specifications were filed, and the application again rejected upon the same reference. Another amendment was made, with claim in the following words: "What I claim is: The stopper, B, located inside the bottle, provided with a bail or handle, C, pivoted or hinged to the stopper, and having a loop or eye, F, at its upper end, as and for the purpose described." This was rejected on reference to the invention of W. H. Hall, filed May 30, 1868. Miller then took leave to again amend, and filed substantially the same specifications, containing the following disclaimer: "I am aware that internally-located bottle-stoppers have been provided with vertical rigid handles or stems for manipulating the same, but owing to the rigid character of the handle the stopper is apt to be forced down into the bottle during transportation; and furthermore, in dispensing the contents of the bottle a rigid handle will interfere with the free flow of the liquid." And upon this last specification and disclaimer a patent was issued to him with the following claim: "The internally-located bottle-stopper, B, provided with a hinged or jointed handle or bail, C, composed of two elastic legs or branches, and an eye or finger loop, as and for the purpose set forth."

Miller having died, the complainant, in October, 1879, obtained an assignment of the patent, and procured the reissue now before the court, in which he was permitted to eliminate the disclaimer from the patent, and was allowed four claims instead of one. The first three of these new claims cover a bottle-stopper with a bail or staple-shaped handle or stem fixed rigidly to the stopper; while the fourth claim of the reissue is substantially the same as the single claim of the original patent. In these cases the defendants are charged with infringing the three new claims obtained by the reissue. In other words, complainant has been allowed to claim and cover by his reissue the very feature or elements in bottle-stoppers of this class which by the disclaimer in his original patent he said were old, and not the subject-matter of a patent, and the sole contest in these cases is as to the validity of these additional claims.

Can complainant, after the death of Miller, who made all the invention there is in this patent, be permitted to reclaim what Miller had solemnly disclaimed, and declared was old?

The defendants make and use bottle-stoppers with a spring bail or handle rigidly attached to the stopper, and one of them, George C. Hutchinson, has obtained a patent dated in April, 1879, over six months before this reissue was made, for a bottle-stopper substantially like that which all the defendants are making and using. This reissued patent was before the United States circuit court for the district of Connecticut in the case of this complainant against Tinkham, in October, 1880, and the learned district judge of that district held the reissue void as to these new claims, on the ground that it appears upon its face to be a different invention from that described in the patent; and, upon the same testimony, this court would, of course, feel bound by that decision. *Putnam v. Tinkham*, 4 FED. REP. 411.

But it is urged that the proof in these cases differs from that in the case before Judge Shipman, for the reason that additional papers from the file wrapper of the original Miller patent and the Hall drawing are before us, and it appears from these that the Hall bottle-stopper referred to was shown only in a rejected application on file in the patent-office; that Hall never had a patent for his device.

Prior to the decision of the *Corn-planter Cases*, 23 Wall. 181, it was the practice of the patent-office to refuse patents when the device was shown in rejected applications on file in the office, but the court held in those cases that such rejected applications must be considered as abandoned experiments, and should not be allowed to defeat a patent.

The drawing of the Hall application, which is now before the court for the first time in the litigation over this reissued patent, shows a handle or stem rigidly attached to an internal stopper, and projecting up through the throat of the bottle, where it was held in place by a spiral spring and a bar reaching across the mouth of the bottle. Is it probable that Judge Shipman, had this new proof been before him, would have held these three new claims valid? It seems to me that the additional proof does not relieve this reissue from the objections made to it in the *Tinkham Case*.

The difficulty with this patent is that Miller, who must be presumed to have known what he had invented, solemnly told the whole world, by his disclaimer, that he was not the inventor of an "internally-located bottle-stopper, with a rigid stem or handle." It is true that his device differed from that to which reference was made, in that his showed the element of the bow or spring which pressed upon

the sides of the throat of the bottle, and thereby aided in holding the stopper in place either open or closed. But for the sake of obtaining his patent upon the hinge or joint by which the bail was attached to the stopper, and which he seems to have deemed the most material or valuable part of his invention, he abandoned this bow or staple-shaped spring element to the public, except when combined with the joint or hinge. When he was referred to this Hall device, with its straight rigid stem, as anticipating his invention, he should have appealed from the examiner who decided against him, but instead of doing so he at once acquiesced in the decision, abandoned the bail rigidly attached to the stopper, and took his patent only on the hinged bail, thereby freely surrendering to the public all the features of his bail, which differed from Hall's, except the hinged or jointed spring bail. He reserved the spring bail, but it was a spring bail jointed to the stopper.

Since these cases were argued the supreme court has decided the case of *Miller v. Bridgeport Brass Co.* 12 O. G. 667, and some part of the opinion bears so pertinently upon the validity of this re-issue that I quote from it:

"Now, while, as before stated, we do not deny that a claim may be enlarged in a reissued patent, we are of opinion that this can only be done when an actual mistake has occurred, not from a mere error of judgment, (for that may be rectified by appeal,) but a real *bona fide* mistake, inadvertently committed, such as a court of chancery, in cases within its ordinary jurisdiction, would correct.

"Reissues for the enlargement of claims should be the exception and not the rule; and when, if a claim is too narrow—that is, if it does not contain all that the patentee is entitled to,—the defect is apparent on the face of the patent, and can be discovered as soon as that document is taken out of its envelope and opened, there can be no valid excuse for delay in asking to have it corrected.

"Every independent inventor, every mechanic, every citizen, is affected by such delay, and by the issue of a new patent with a broader and more comprehensive claim. The granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and void. It will not do for the patentee to wait until other inventors have produced new forms of improvement, and then, with the new light thus acquired, under pretence of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms.

"Such a process of expansion, carried on indefinitely, without regard to lapse of time, would operate most unjustly against the public, and is totally unauthorized by the law. In such a case, even he who has rights and sleeps upon them, justly loses them."

The reissue now before me was not obtained on any valid claim or pretext of "inadvertence or mistake." All that could have been urged is what is urged here, that the examiner had denied an application for the patent on the ground that he deemed it anticipated by the device of Hall. This was not, I think, a "mistake or inadvertence," within the meaning of the patent law, such as entitled Miller's assignee to a reissue. It was at most an erroneous ruling by an officer having *quasi* judicial powers, and which could have been appealed from and presumably corrected; for the *Corn-planter Cases* were decided within a month or two after Miller's application was denied on the Hall reference, but Miller conceded the correctness of the ruling, and disclaimed the rigid bail or stem, with or without the spring element, and took his patent on the hinged bail alone.

I think Putnam, when he bought this patent, took it with all the concessions Miller had made for the purpose of obtaining it, and should not have been allowed in the reissue that which Miller had surrendered, especially after so much time had elapsed and the public had, as the proof shows in this case, begun the use of that which Miller had made public property.

For these reasons I must dismiss these bills, on the ground of the invalidity of the first three claims in the reissue, which are the only ones the defendants are charged with infringing.

PUTNAM v. HUTCHINSON.

(Circuit Court, N. D. Illinois. April 17, 1882.)

1. SUBSTITUTES OR EQUIVALENTS—INFRINGEMENT.

Where defendant's device is but the substitute or equivalent for all practical purposes of the device shown in complainant's drawings, it is a mere colorable evasion of complainant's device, as complainant may change the form of construction from that shown in his patent, and substitute a well-known equivalent.

2. INTERFERENCE—VOID PATENT.

Patent No. 225,476, being for an improvement in bottle-stoppers is void, by reason of its interference with reissued patent No. 9,002.

J. P. Altgeld, B. F. Thurston, and A. von Briesen, for complainant.
West & Bond, for defendant.

BLODGETT, D. J. This is a bill filed by complainant as owner of reissued patent No. 9,002, and asking to have a patent issued to

Charles G. Hutchinson, defendant, on the sixteenth day of March, 1880, and numbered 225,476, set aside and declared void, on the ground that defendant's patent interferes with the complainant's reissued patent, and is a cloud upon complainant's title; the proceeding being based on section 4918, Rev. St.

The defendant's answer denies the validity of the original and reissued patent held by complainant, and denies the interference of the two patents; and insists further that the reissued patent of complainant is void, because it contains new matter not described in the original patent.

The original patent, of which complainant's patent is a reissue, was issued to Joel B. Miller on the twenty-seventh day of October, 1874, for an improvement in "bottle-stoppers," and by his original patent Miller claimed as his invention "the internally-located bottle-stopper, B, provided with a hinged or jointed handle or bail, C, composed of two elastic legs or branches and an eye or finger loop, as and for the purpose set forth;" and in the reissue the *fourth* claim is in these words: "The internal bottle-stopper, provided with a hinged or jointed bail, C, which is composed of two elastic legs or branches, A, and of an eye or finger loop, substantially as herein shown and described."

The only question in this case is whether the patent of Hutchinson, No. 225,476, interferes with the *fourth* claim of the reissued patent of complainant, and whether the fourth claim of the reissued patent is valid. The distinctive characteristic of the complainant's original and reissued patent is the spring bail, C, which is hinged or jointed to the stopper, this spring bail passing from the stopper up through the neck of the bottle, and being so adjusted as to press against the neck of the bottle so as to hold the stopper in place either when the bottle is open or closed, or to prevent the stopper from falling into the bottle when the bottle is opened for the purpose of discharging its contents. This spring loop is made staple-shaped,—that is, of two legs or branches which bow outwards, so as to form springs which bear against the sides of the throat of the bottle; and the lower ends of this bail are clasped or bent around the loop or eye of the stopper in such manner as to form a joint or hinge, and allow the legs of the bail to spring or bend inwardly or outwardly as they are pressed down or drawn up for the purpose of closing or opening the bottle. A cursory examination of the drawings accompanying the original specifications of the Miller patent shows that it was intended that the pressure of the spring against the throat of the bottle

should aid in holding the stopper in place when the bottle was closed, as well as when the bottle was open. It will be seen from the drawings in the original patent that this bail is intended to bear or press outwardly against the sides of the throat of the bottle, so as to hold the stopper in place.

The defendant's patent describes quite at length the manner in which he constructs his bottle-stopper. His stopper is what is known as the "disk" or "valve stopper," in contradistinction to the plug shown in the device of Miller. This disk stopper is made by inserting a disk of rubber or other suitable elastic material between two smaller metal disks, so as to hold it firmly in place, and to the upper side of the upper disk is attached an eye or loop, precisely in its mode of construction and operation like the eye or loop attached to the stopper described and shown in the Miller patent. To this eye or loop is attached the bail or handle, F, which is, for all intents and practical purposes, the complainant's bail, C, except that the defendant has more minutely and specifically described the shape of his bail, showing that it has an enlargement or bulge below the top loop, which is accomplished by making an additional bend in the legs of the bail.

It is contended by the defendant that the complainant is confined in the construction of stoppers, under his patent, to a plug such as is shown in his original drawings; but it will be observed that neither in the original nor reissued patent of Miller is any stress laid upon the manner in which the stopper is to be constructed, and disk or valve stoppers are shown by the proof to have been old at the time Miller's patent was granted, and it is obvious that the defendant's disk is but the substitute and equivalent, for all practical purposes, of the plug shown in complainant's drawings. There can be no doubt, from the authorities, that the substitution by defendant of this well-known disk for the plug is a mere colorable evasion of the complainant's device. Indeed, I have no doubt that the complainant, in the construction and use of his device, had the right to use a disk as a stopper in his bottles instead of a plug; and the proof shows that before the defendant applied for his patent the plaintiff was manufacturing disk bottle-stoppers under his reissued patent, substantially the same as those described in the defendant's patent. The right of the complainant to change the form of construction from that shown in his patent, and substitute a well-known equivalent for it, is fully established in *Gould v. Rees*, 15 Wall. 187; *Vogler v. Semple*, 7 Biss.

382; *Webster v. Carpet Co.* 5 O. G. 522; *Storrs v. Howe*, 10 O. G. 421; *Corn-planter Cases*, 23 Wall. 181.

The authorities above cited show abundantly that complainant could maintain a suit for infringement against any one who makes disk bottle-stoppers combined with the other elements of his fourth claim. That is, under his patent on the combination of a stopper with a hinged bail, he covers any form of stopper then known which he chose to adopt.

As I have already said, the defendant's loop, F, is substantially the complainant's bail, C, although he describes in detail what he insists is a modification or improvement of its shape in the following terms. "The loop formed by the spring, F, is centrally contracted, so that it conforms to the contracted part of the neck of the bottle to a greater or less extent." The plain statement of this description is that defendant makes a bulge or enlargement in his bail below the finger loop, so that when the bottle is closed the bulge is drawn above the throat, and aids in keeping the stopper in place, and when the bottle is open the bulge is below the most contracted part of the neck, and keeps the stopper from falling back into the throat of the bottle as the contents are discharged. But it is noticeable that the bulge and contracted part of the bail so carefully described by defendant is substantially shown in the drawings accompanying the original and re-issued Miller patent, although Miller does not describe them in his specifications, and the only perceptible difference between the shape of the bail, as shown in complainant's and defendant's patents, is that defendant's bulge or enlargement is a little lower down or nearer the joint, obviously to adapt it to the throat of a bottle somewhat different from that shown in complainant's drawings. But even if this bulge or enlargement shown in defendant's patent was not also shown in complainant's, I should deem it one of those modifications of construction which is allowable in the practical application of any patented device, and contains no element of invention. It is simply a practical application of the Miller bail to the different forms of bottle necks, so as, perhaps, to make it more convenient in use; but it is only such a mechanical change or improvement as would naturally suggest itself to a person using the device.

It is also urged that stoppers and bails under the Miller patent must be so constructed as to permit of the bail being turned down over the neck of the bottle. It is true that in a statement of the utility of his stopper Miller states in his specifications that the bail

can be turned away from the neck of the bottle so as to avoid displacement of the stopper, but I do not understand that he made that a necessary element in his bail, because, whether the top of the stopper can be drawn sufficiently near the mouth of the bottle to permit the bail to be turned away by the joint, depends wholly on the shape of the neck of the bottle. The bottle neck may be so shaped that the stopper cannot be drawn or forced near enough to its mouth to allow the bail to be turned away.

There can be no doubt, I think, that the Hutchinson patent is for essentially the same device which is described in the fourth claim of complainant's reissued patent; and, such being the fact, there can be no doubt that it interferes with the complainant's patent, and there is a complete failure of proof showing the invalidity of the fourth claim of complainant's patent. The proof certainly shows that Miller invented the hinged bail, C, and there is no proof that this had been anticipated in the older art. If this fourth claim of the reissued patent is valid, then the patent is so far *valid*, and the question of the validity or invalidity of the other claims is not material to the merits of this case.

I conclude, therefore, that complainant is entitled to a decree declaring Hutchinson's patent, No. 225,476, void by reason of its interference with complainant's reissued patent No. 9,002.

The statute authorizes the court, in a proceeding of this character, to declare either of the patents void, in whole or in part. I have already held, in the cases of the same complainant against this and other defendants, that the first three claims of this reissued patent are void by reason of their not being for the same invention described in the original Miller patent; and it is, perhaps, unnecessary that any decree should be entered in this case holding those claims void.

J. B. SHERIFF & SON v. A. FULTON'S SON & Co.

(Circuit Court, W. D. Pennsylvania. March 25, 1882.)

1. PATENTS FOR INVENTION—REISSUE—ENLARGEMENT OF CLAIMS.

Where the claim made in the original patent for a siphon pump was for a specific device described in the specifications and drawings, but in the reissue disappears from the patents, and substituted therefor is a sweeping claim covering every form of water ejectors, although the claim made in the reissue was originally allowable when the original patent was granted, after the lapse of nine years a reissue embodying so comprehensive a claim is invalid.

2. SAME—UNREASONABLE DELAY.

A delay of nine years is unreasonable on an application for a reissue wherein the original claim is enlarged.

In Equity.

Bakewell & Kerr, for complainants.

M. D. Connelly, for defendants.

ACHESON, D. J. This suit is upon reissued letters patent No. 9,199, issued to Hugh Coll May 18, 1880, the bill charging infringement and praying for an injunction, etc. The original letters patent, No. 110,205, were issued to Coll December 20, 1870. The invention, as the original and reissue both recite, consists in improvements to a siphon pump patented to said Coll June 8, 1869.

To the proper understanding of the case, therefore, a brief explanation of Coll's earlier letters patent, No. 90,930, dated June 8, 1869, seems necessary. They relate to the construction of a steam siphon pump, or water elevator, having outer and inner pear-shaped hollow heads, so that a jet or current of steam shall elevate water and discharge it through and from either or both the heads. These heads, respectively, have one end tapered down to the form of a tube or pipe, thus forming inner and outer discharge pipes, the inner one being much smaller than the outer one. A steam-injection pipe is screwed into or cast on the outer or rear end of the outer head, and extends some distance into the inner head, which latter, at its rear end, is screwed on or otherwise fastened to or cast on the injection pipe. Back of the discharging end of the steam-injection pipe inlets or openings are made in the inner head. The steam passing out of the injection pipe into the inner discharge pipe, and thence into or through the outer discharge pipe, produces a vacuum in the heads, and the water coming up the induction pipe to fill the vacuum is caught by the flow of steam and forced out of the discharge pipes, and a regular current is established, which is kept up by the continual

pressure of the steam. By closing up the annular space between the two discharge pipes the water may be discharged entirely through the inner discharge pipe, being slightly warmed by this method. The claim in this patent is exclusively for the combination of the inner and outer pear-shaped heads with the injection pipe.

The invention secured by the letters patent of December 20, 1870, (No. 110,205,) is therein declared to be an improvement on Coll's said patented siphon pump, and to consist "in modifications of form and construction," whereby it is adapted to new uses, or made to accomplish old results in a better manner. The outer head being of the usual construction and having the usual water-inlet opening, and an opening for the insertion of the steam-injection pipe, the material modification is stated to consist in cutting off the base or blunt end of the inner pear-shaped head at or near the broadest part, and connecting this head, in casting, to the outer head by means of radial arms. In the specification the patentee states the advantage thereby secured to be as follows:

"The inner head, *d*, having a large unobstructed opening at its base, I have devised more particularly for use in pumping or ejecting bilge-water, the water out of tan-vats, etc. As some tan-bark is necessarily carried up with the water, the holes or passages for the water are apt to become clogged unless ample room be left for the flow of both. I thus adapt the double head to the uses described."

The first claim of this patent (which is the principal and only material one) is in these words:

"The inner head, *d*, open at its rear end so as to leave an unobstructed opening around the steam-injection pipe for the passage of such pieces of solid matter as may be brought up by the water, such inner head, *d*, being connected to the outer head, *a*, by means of radial arms, *a*, all arranged substantially as described."

The application for the reissue (No. 9,199) was filed March 13, 1880, and is dated May 18, 1880. The specification of this reissue, after describing the invention and its advantages substantially as the original specification (No. 110,205) did, and stating that "this ejector operates on the same principle as my ejector patented June 8, 1869; does," proceeds to set forth other advantages neither mentioned nor hinted at in the original specification, (No. 110,205,) viz.: that the jet of stream is protected and surrounded by the inner head, which acts as a breakwater or dam to break the force or impact of the inflowing current, and hence does not condense so rapidly as in the old form of ejectors, where it came directly in contact with the whole

volume and unbroken force of the inflowing water in the outer head, and the force of the steam-jet is thereby preserved; that the forward end of the outer chamber is closed, and the entire discharge is through the inner head, and that the rear opening of the inner head extends over the induction opening, and acts as a breakwater, to deflect and turn the inflowing stream of water to the back part of the outer head and break its force.

The reissue (No. 9,199) has but one claim, which is as follows:

"A water ejector, provided with an inner head or shell, extending backward over the water-induction opening, and arranged with relation to the jet-pipe so as to protect the steam-jet from the direct impact of the inflowing current of water, the inner end of said head being provided with a large unobstructed opening, through which all the water passes to the discharge outlet of the ejector, substantially as and for the purpose described."

Upon a comparison of the original patent of December 20, 1870, with the reissue it is manifest that the claim made in the reissue is a great expansion of the original. Clearly the original patent did not cover and could not rightfully cover the inner head itself, for Coll's earlier patent showed an inner head, which, moreover, surrounded and protected the steam-jet from the direct impact of the inflowing current of water, and operated to retard the condensation of the steam. The specification of the patent of 1870 declares that invention to consist "*in modification of form and construction*" of Coll's siphon pump theretofore patented. These modifications are distinctly set forth and explained in the body of the specification, and are specifically claimed. In lieu of the inlets at the rear end of the inner head, the blunt end of this head is cut off, and at its rear end an unobstructed opening is left around the steam-injection pipe for the passage of such pieces of solid matter as may be brought up with the water. It is an essential feature of the device that the steam-injection pipe shall be inserted through the usual opening in the outer head into the inner head. Coll himself, testifying in this case in behalf of the plaintiffs, states that the difference between his patents of 1869 and 1870 is "a difference of construction only," and that the difference is in the large unobstructed opening in the rear of the inner head, and the manner in which the head is secured to the outer head; and, putting this nozzle in and across the space between the inner and outer head." All this plainly appears, both by the specification and the drawing, and is specified in the claim. Undoubtedly the claim is for the specific device described.

But we search the reissue in vain for such limited claim. It has disappeared from the patent, and substituted therefor is a sweeping claim covering every form of water ejectors having an inner head or shell open at its rear end, and (within the limitations mentioned) *so arranged with relation to the jet-pipe* as to protect the steam-jet from the direct impact of the inflowing current of water. How comprehensive this claim is (or is supposed to be) can be best illustrated by reference to the siphon pump made or sold by the defendants, and which the plaintiffs contend infringes the reissued patent. The defendants' siphon pump (which it is plain does not embody the specific device claimed in the patent of 1870) has a permanently-fitted, bell-mouthed, open-ended, inner head or shell, which extends backward across the water-induction opening, but the steam-injection pipe does not enter the outer head at all. The steam-nozzle, which is screwed into the end of the outer head, but does not extend into the head, has several apertures, through all of which steam-jets enter the outer head. The steam-nozzle is opposite the mouth of the inner head, but between the latter and the steam openings there is an open space. These features (with other peculiarities) are found in letters patent dated February 2, 1875, granted to Louis B. Fulton and Julius Proeger.

Now it may well be that the claim made in the reissue was originally allowable when the patent of December 20, 1870, was granted; but Coll, having then limited his claim to a specific device, could he, after the lapse of more than nine years, procure a valid reissue embodying a claim so enlarged and comprehensive? I am of opinion that he could not. The delay was altogether unreasonable, and the reissue, therefore, without authority of law. The recent decisions of the supreme court in the cases of *Miller v. Bridgeport Brass Co.* 21 O. G. 201, and *James v. Campbell*, Id. 337, leave the question no longer an open one. An acquiescence by the patentee and his assignees, for so long a period in the terms of the patent as originally granted, created an equitable estoppel in favor of the public. *Combined Patents Can Co. v. Lloyd*, 21 O. G. 713; [S. C. 11 FED. REP. 149.]

It was, indeed, urged in justification of the reissue that the first claim of the original patent was inoperative and invalid because it included as a constituent element with the inner head the radial arms, by which the head is held in place; these arms, it is said, being a mere incident of convenience of construction, and having no functional relation whatever to the inner head or any other part of the organism in securing the objects to be attained, and the claim,

therefore, being bad under the doctrine of aggregation as enunciated in *Hailes v. Van Wormer*, 20 Wall. 353. If this were so, however, it by no means follows that upon a surrender at so late a day, to correct such mistake, the scope of the patent could be so enlarged as was here attempted. But the original claim was not obnoxious to the objection suggested. The radial arms, or their equivalent, seem essential to secure all the objects contemplated. At any rate, the effect of including them was to limit the claim, not destroy it. Unquestionably, the original claim was good for the specific device described.

Having reached the conclusion that the reissue sued on is invalid, the plaintiff's case therefore failing, it is, of course, unnecessary to consider the other defences relied on.

Let a decree be drawn dismissing the bill, with costs.

SEARLS v. BOUTON and others.*

(Circuit Court, S. D. New York. March 18, 1882.)

1. LETTERS PATENT—IMPROVEMENT IN WHIP-SOCKETS—VALIDITY OF.

Reissue No. 9,297, granted to Anson Searls for a centrally-perforated rubber disk fitting loosely into an inner groove near the top of a whip-socket, and retained in place by the expansive force of the rubber, and letters patent No. 150,195, granted John M. Underwood for an improvement thereon, by which such rubber disk could be made thick enough to well retain its place in the socket, and at the same time yielding enough to permit ready insertion of the whip, by cutting away portions of it at intervals between the outer edge and the perforation, are good and valid, and not void for want of novelty.

2. SAME—DEFENCES—PRIOR USE.

Proof of prior knowledge and use of an invention cannot prevail where the answer merely alleges prior knowledge, and does not set forth where and by whom the invention had been used, as required by the statute.

3. SAME—LICENSE TO MANUFACTURE.

Where defendants attempt to justify under a personal license to manufacture, the burden of proof is upon them to make it clear that the articles sold by them, which would otherwise be an infringement, were made under and pursuant to the license; otherwise they must be adjudged to have infringed.

In Equity. On final hearing.

J. P. Fitch, for plaintiff.

N. Davenport, for defendants.

WHEELER, D. J. This suit is brought upon reissued letters patent No. 9,297, to the orator, for an improvement in whip-sockets, and

*Reported by S Nelson White, Esq., of the New York bar.

upon original letters patent No. 150,195, to John M. Underwood, assignor to the orator, also for an improvement in whip-sockets. The defences set up in the answer are, to the former, that it was not properly reissued for the same invention described in the original; that the invention had been previously patented in several prior patents in this country; that the invention was previously "well known" to, among others, Charles A. Flesche, John Perpent, and E. E. Stevens, without saying that it had been used by any person; and that defendants have not infringed; and to the latter the defence of want of novelty. Although this objection to the reissue is set up in the answer, the original patent is not put in evidence at all, and there is nothing properly before the court by which to determine whether the original and the reissue are for the same invention or not. As the reissue was granted by the proper officer, the presumption is that it was properly granted, and there is nothing in the case to overcome that presumption. The patent is for a centrally-perforated rubber disk fitting loosely into an inner groove near the top of a whip-socket to steady the whip, and retained there by its expansive force, keeping its outer edge within the walls of the groove, and permitting the insertion and withdrawal of the whip by its elasticity. The evidence shows that such disks had been for some time known and used for this purpose by being placed in the whip-socket near the top, and being clamped or held there by the outer edge placed firmly between the body and top of the socket, or between a shoulder in the socket and a closely-fitting ring, and by other similar arrangements for holding the outer edge tightly. These were patented in the prior patents set up in the answer. In the use of disks so fastened the insertion and withdrawal of the whip would bend the inner part up and down, and cause it to break from the outer part at the edge of where it was firmly held. The invention of the orator obviated this breaking largely by allowing the outer edge of the disk to roll in the groove with the movement up and down of the interior. This kind of disk was not described in any of the prior patents. It could be used in a socket found in one piece in that part; and the patent describes making its outer edge of harder rubber than its inner edge, to make it more secure in its place, and still permit the insertion and withdrawal of the whip. There are three claims: the first is of a whip-socket formed there in one piece, with a groove, and such a disk inserted in it; the second is for the combination of such a disk so held in place with a whip-socket; and the third is for such a combination, with a disk having its outer edge of harder rubber. The second claim seems to cover the whole

that the patent can be construed to cover. The whip-socket, without the loosely-fitting disk in the groove, would not be new; and such a fitting disk in a whip-socket would include one with a harder edge. This combination is not shown in any of the patents. The patents are all for comparatively small differences; and this difference is small, but it exists, and is large enough to be patented.

The allegation in the answer as to knowledge, without an allegation of use, seems to have been made intentionally, in view of the evidence to support it, rather than inadvertently. The proof, at most, shows that but two sockets were made showing this invention, and that these were laid away with other specimens without the rubber disks being in the grooves. Flesche, who made them, afterwards took a patent, which is one of those set up as anticipations, without this feature, and no use of them otherwise is shown. One of them, defendant's Exhibit L, is in evidence, with a rubber disk made since in the groove. As so put together this exhibit does seem to show all the elements of this patent as construed. The evidence was seasonably objected to for the reason of the lack in the answer, and the question is whether such an answer, supported by proof, will defeat a patent. The section of the statute relating to the granting of patents provides that they may be granted if the invention was not known or used by them, as if either knowledge or use would prevent. Rev. St. § 4886. The section relating to defences, and the mode of making them, provides for notice stating not only the names and residences of the persons alleged to have had prior knowledge of the inventions, but adds, "and where and by whom it had been used."

In *Gayler v. Wilder*, 10 How. 477, it was held that these statutes were to be construed together, and with others on the same subject, and that prior knowledge of an invention not accessible to the public would not defeat a patent. The knowledge might be acquired in a foreign country, and the invention not be patented or described in a printed publication there, and such knowledge would not prevent or defeat a patent by another in this country. The answer alleges knowledge by persons of New Haven, Connecticut, but not knowledge at New Haven or any other place. The proof goes beyond this, and shows such knowledge as there was to have been at New Haven; but affirmative defences, and especially this defence, as provided and regulated by the statute, must be alleged as well as proved, and proof objected to for want of allegation will not help out the defence. *Roemer v. Simon*, 95 U. S. 214. This defence cannot prevail as made.

The defence of non-infringement rests upon a license granted by the orator to John O. Merriam and Edwin Chamberlain "to manufacture" "at their shop in Troy, N. Y., and no other place or places." This appears to be a personal license, not transferable, and a license to make only. Merriam and Chamberlain had a shop in Troy, and constituted a firm. Merriam seems to have sold out to a new firm composed of Edwin Chamberlain and Perry D. Randall. Edwin Chamberlain has since died, and Edward Chamberlain has succeeded him in the firm of Chamberlain & Randall. Merriam appears to have ordered material, or to have permitted Chamberlain & Randall to order them in his name, for use in making whip-sockets at that shop, but he does not appear to have been engaged himself in the manufacture. Sockets made under and pursuant to the license would be free to the trade, but sockets merely dealt in by the licensees would not thereby be made free. The defendants have not made it clear that the sockets they have sold, which would otherwise be an infringement, were made under and pursuant to the license. Therefore, they must be adjudged to have infringed. The extent of the infringement, unlawfully done, must, of course, go to the master for determination.

There was some difficulty in having these rubber disks thick enough to well retain their places in the sockets and at the same time yielding enough to permit ready insertion and withdrawal of different-sized whips. Underwood invented cutting away portions of the disk at intervals, around between the outer edge and the perforation, making them more yielding in the interior, whereby this difficulty was, in some measure at least, overcome. His patent is for this improvement. The evidence of anticipatory devices shows nothing like this. As the case is made up and presented, the patents must both be adjudged valid, and to be infringed.

Let a decree be entered for the orator for an injunction and an account, according to the prayer of the bill, with costs.

SIMPSON v. DAVIS.

(Circuit Court, E. D. New York. March 18, 1882.)

1. PATENTS FOR INVENTIONS—NEW DESIGNS.

A claim is not defeated merely because scrolls and ornamentation similar in effect to the scrolls and ornamentation described have before been employed, if a new idea is embodied in the method of their arrangement.

2. SAME—ORIGINAL SHAPE OR CONFIGURATION.

The statute permits a patent for any new, useful, and original shape or configuration of any manufacture; and where the arrangement of ornament and shape is new, useful, and original the invention is patentable.

Edwin H. Brown, for plaintiff.

N. H. Clement, for defendant.

BENEDICT, D. J. This action is brought upon a patent owned by the plaintiff, which, it is alleged, has been infringed by the defendant. The patent is for design No. 12,026, and was issued November 9, 1880, to Henry Textor. The specification states that Henry Textor is the originator and producer of a new and improved design for newel posts, the character of which is illustrated by a drawing accompanied by a description. There are 11 claims. Only the fifth, the sixth, and the eleventh are relied on here. It is not disputed that the defendant is engaged in manufacturing newel posts, similar in ornament, shape, and configuration to the newel posts described in the plaintiff's patent. The similarity is so great that a photograph of the plaintiff's newel post is admitted to correctly represent the newel post made by defendant. No question in regard to the infringement is therefore raised, but it is contended that the patent is void for want of novelty as well as of patentability in the subject-matter.

The fifth claim of the patent is for "a design for the upper portion of a newel post, consisting of the scrolled ornaments, *l*, and the bead, *m*, the roses or rosettes, *n*, upon each side, as specified." The statute (Rev. St. § 4929) authorizes a patent for any new and original ornament to be cast or otherwise placed on any article of manufacture. The subject-matter of the claim under consideration is for an ornament, not for a newel post or a part of a newel post having a new and original shape or configuration, but for an ornament intended to be placed upon a newel post. The claim does not seek to secure the scroll by itself, nor the bead by itself, nor the roses by themselves. Each of these is an ornament, but neither of them is new. The claim, therefore, seeks to cover these forms associated together in the

manner described as composing a single ornament. In the matter of ornamentation mere juxtaposition of old forms is doubtless sufficient to authorize a patent for an ornament when, by means of such juxtaposition, accomplished by industry, genius, effort, and expense, the old forms are made to become component parts of an ornament substantially new in its effect. But the result of the industry, genius, effort, and expense employed must, as I suppose, be a single ornament, which, taken as a whole, can be considered to be the embodiment of a new idea in ornamentation. The amount of the novelty may be small, but the effect of the ornament must, to some extent at least, be new. The ornament may, in this sense, be new and original, although all the forms used in its composition are old and well-known forms of ornamentation.

The claim under consideration is therefore not defeated when it is shown that scrolls similar in effect to the scroll described in the claim, and that beads and roses such as those described, have often before been employed in the ornamentation of newel posts. The difficulty with the claim does not arise from want of novelty in the forms employed, nor yet in the want of novelty in the method of arranging these forms, because, simple as the arrangement is, the case furnishes no evidence that a scroll and roses were ever before arranged one above another, with only a bead between. But I find it difficult to consider that the scroll, roses, and bead, when arranged as described in the claim, constitute a single ornament. There is no commingling of the lines forming the scroll, the bead, and the roses; no new idea seems to be embodied in the method of their arrangement. All that has been done is to place these distinct and well known-ornaments one above the other, without the production of any such combined effect as to entitle the whole to be treated as a new and original ornament. No new ornament has in fact been produced. If, therefore, the plaintiff's action rested upon the fifth claim of his patent alone, I should hesitate to uphold it.

The sixth claim is for "a design for the cap of a newel post, consisting of the gable-like projection, *e*, having rounded or curved outlines, the recessed or sunken scrolled ornaments, *s*, the foliated moulding, *t*, and the fillet, *u*, as specified." The statute authorizes a patent for "any new and original design for a manufacture;" and this claim is intended to cover such a design. The first question presented by this claim is whether the cap of a newel post is a manufacture within the meaning of the statute. The testimony shows that the cap of a

newel post is a distinct article often manufactured by itself, but never used except in connection with other parts, which, taken together, go to make up what is known as a newel post. Upon this testimony I incline to the opinion that the article described in the sixth claim, namely, a cap of a newel post, may be held to be a manufacture; but whether this be so or not seems of no importance in view of the seventh claim of the patent, which is for the whole newel post, including the cap. The statute permits a patent for any new, useful, and original shape or configuration of any article of manufacture. The seventh claim describes an article of manufacture, namely, a newel post of a certain shape or configuration, and having, among other distinctive features, the ornaments described in the fifth claim, and the cap described in the sixth claim.

Against this claim the only defence made is that the distinctive features of the newel post described were to be found in other newel posts prior to the date of the plaintiff's invention, and many of them, in fact, copied by the inventor himself from newel posts erected in New York. But here the difficulty with the defence is that there is no evidence that any newel post substantially similar in shape and configuration to the one described in the plaintiff's patent had ever before been designed. The arrangement of ornament and shape presented by the plaintiff's post is new, useful, and original. The several experts testify that the newel post described in the patent would not be considered, either by the trade or by those wishing to buy such articles, to be similar to any of the other newel posts put in evidence; and the proof is that as between the plaintiff's newel post and the one most similar to it of all those put in evidence, the demand has been twenty to one in favor of the plaintiff's post. Moreover, the defendants have thought it worth the while to copy the plaintiff's post exactly.

I am therefore of the opinion that the seventh claim of the plaintiff's patent can be upheld, and that the patent secures to the plaintiff the exclusive right to make newel posts such as are in said claim described. The fact being undisputed that the defendants have made newel posts similar to the post described in the seventh claim, it follows that the plaintiff is entitled to an injunction as prayed for, and also for an accounting.

HOLLIDAY and others v. PICKHARDT and another.*

(Circuit Court, S. D. New York. March 11, 1882.)

1. PATENTS FOR INVENTIONS—DECISION OF PATENT-OFFICE.

The decision of the patent-office in an interference, that the product claimed in a patent can be produced by following the directions contained in the specification, is evidence of such fact on a motion for injunction.

2. SAME—INFRINGEMENT—SUBSEQUENT PATENT.

The fact of the granting of a patent has no tendency to show that the invention described in it does not infringe a prior patent.

In Equity. On motion for preliminary injunction.

Dickerson & Dickerson, for plaintiffs.

George Gifford and J. Van Santvoord, for defendants.

BLATCHFORD, C. J. Professor Seeley testifies that he practiced the process set forth in No. 250,247, using the exact proportions and materials specified therein, and produced thereby a product, a sample of which is Exhibit B. He says that Exhibit A (the defendants' article) seems to him to be identical with B; that he has tested them in various ways to determine their similarity; and that he is clearly of opinion that A is the product described in No. 250,247, and claimed in the first claim thereof. Professor Morton, for the defendants, does not say that A is not identical with B. What he says is that B is, manifestly, not the product obtained by following the directions of No. 250,247, and that he does not hesitate to say that B was not made by following said directions. Professor Chandler does not say that A is not identical with B. What he says is that he has examined B, and, from his knowledge and experience of the plaintiffs' process, is convinced that B was not made by said process. Dr. Endemann does not say that A is not identical with B. What he says is that he has found that B is a product which could not be produced by following the directions of No. 250,247. There is, therefore, no dispute as to the identity of A with B. The contention of the defendants is merely that B cannot be produced by following the directions in No. 250,247. Their experts do not exhibit any article which they say they produced by following the directions in No. 250,247, nor do they give any analysis of B.

In the interference before the patent-office, Professors Morton and Chandler testified that they had followed the directions given in Holliday's specification, and had been unable to produce what he

*Reported by S. Nelson White, Esq., of the New York bar.

claimed those directions would produce. The patent-office then directed Holliday to satisfy it that he could obtain the product claimed by the process described in his specification. The report of the examiner shows that in his presence Holliday, by following the directions of the specification and using fuming sulphuric acid, tested by Beaume's hydrometer, at over 69 deg., and almost exactly 70 deg., produced a true sulpho-conjugate acid salt of rosaniline, capable of being dyed in a hot acid bath and preserving its color; not passing into blue through crimson, and made from fuchsine by the reaction of fuming sulphuric acid thereon. This report was confirmed by the commissioner of patents, and he rejected the testimony of the chemists who said they had followed the instructions and had been unable to produce the alleged product. This very point, therefore, as to whether Holliday's description would make his product, was decided in his favor by the patent-office, on a direct issue as to it between him and Caro, whom the defendants represent. There is nothing more now presented on that subject than was before the patent-office, and, for the purposes of this motion, it must be held that it was made by following the Holliday description. The patent-office also decided that Caro's product and Holliday's product were identical. It does not appear that A is not the same thing which was before the patent-office as Caro's product. The patent-office also decided the question of priority of invention in favor of Holliday. Under such circumstances the plaintiffs are entitled to an injunction. *Hanford v. Westcott*, 16 O. G. 1181. The fact of the granting of a patent to Caro has no tendency to show that the product A, which is the same Caro product that was before the patent-office in interference, does not infringe No. 250,247.

The motion for a preliminary injunction is granted.

PERRY and another, as Trustees, etc., v. Co-OPERATIVE FOUNDRY Co.
and others.

(Circuit Court, N. D. New York. 1882.)

PATENTS FOR INVENTIONS—INVENTION—WHAT IS NOT.

Where the relation between the parts is the same in the arrangements between the patented article and another article in prior use, and the only difference is one of degree as to quantity, or one of convenience as to the character of the device to be used, it does not involve an invention.

BLATCHFORD, C. J. This suit is brought on two patents: (1) reissued letters patent No. 9,247, granted to John S. Perry and Grange Sard, Jr., trustees, June 8, 1880, for an "improvement in stoves," the original patent, No. 54,938, having been granted to George R. Moore, as inventor, May 22, 1866, and having been reissued as No. 6,732, November 9, 1875; (2) reissued letters patent No. 9,252, granted to John S. Perry and Grange Sard, Jr., trustees, June 15, 1880, for an "improvement in stoves," the original patent, No. 89,304, having been granted to Calvin Fulton, as inventor, April 27, 1869, and having been reissued as No. 5,907, June 9, 1874.

1. As to the Moore patent, the claims alleged to have been infringed are claims 1 and 4, which are as follows: "(1) The combination, with the grate or fire bed of a stove, of a downwardly-contracted fire pot, the two being so arranged relatively to each other as to leave an opening between them, substantially as and for the purpose set forth." "(4) The combination in a stove of a downwardly-contracted fire pot and a dumping grate, the two being arranged relatively to each other so as to leave an opening between them, substantially as and for the purpose set forth." These claims, in view of what existed before, show no patentable invention. An anti-clinker opening between a dumping grate and the bottom of the fire pot above it, with the grate larger in area than such bottom, existed before. Downwardly-contracted fire pots existed before. There was no invention in combining an old downwardly-contracted fire pot with an old anti-clinker opening and dumping grate. The whole idea is in the anti-clinker opening. No new or different effect in the combination which results in such opening exists when the fire pot above is contracted downwardly, from that which exists when the fire pot above is cylindrical.

2. As to the Fulton patent, the only claim insisted on at the hearing as having been infringed is claim 1, which is as follows: "A

stove grate, so constructed and arranged relatively to the fire chamber or fuel receptacle as to leave between the two and around the edge of the grate a free, open-space end, to permit of the removal of clinkers and other refuse through such space by use of the ordinary poker or slicer, substantially as described." An anti-clinker opening between a dished grate and a fire pot existed before, and also a flat grate. All that the patentee did was to substitute a flat grate for a dished grate in the arrangement. The relation between the grate and the bottom of the fire pot, so as to leave the space between the two and the space around the edge of the grate, is the same in the two arrangements. The only difference is one of degree as to the quantity of refuse which the rotation of the grate or the use of the poker will discharge, or one of convenience as to the character of the poker which will be used, and does not involve invention.

The bill is dismissed, with costs.

CAMPBELL v. WARD.

(Circuit Court, D. New Jersey. May 26, 1882.)

PATENTS FOR INVENTIONS—INVOKING EQUITABLE RELIEF.

Where the bill upon its face shows that the patents alleged to have been infringed had expired when suit was commenced, and it is in the usual form, and simply prays for an injunction, and for an account for profits and damages, and there is no allegation of special grounds for equitable relief, it will be dismissed.

Root v. L. S. & M. S. Ry. Co. 21 O. G. 1112; 8 C. 11 FED. REP. 349, note.

On Demurrer to Bill, etc.

Marcus P. Norton, for complainant.

A. Q. Keasbey, U. S. Atty., for defendant.

NIXON, D. J. This is a suit in equity, brought by the complainant against William Ward, postmaster of the city of Newark, for the alleged infringement of certain reissues of two letters patent,—one numbered 38,175 and dated April 14, 1863, and the other numbered 37,175 and dated December 16, 1862, and severally issued to Marcus P. Norton, under whom the complainant holds by mesne assignments. The bill of complaint was filed on the first of November, 1880, several months after the two patents had expired on which the reissues were made. A demurrer was filed to the bill, and several grounds

for the demurrer assigned. The fourth reason was that at the time of filing of the bill of complaint both of the letters patent on which the suit was founded had expired, and that the court, sitting in equity, had no jurisdiction to maintain a suit for infringement, the complainant having a complete and adequate remedy at law.

It has recently been held by the supreme court, in the case of *Root v. L. S. & M. S. Ry. Co.* 21 O. G. 1112, "that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief, ordinarily, is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against the continuance of the infringement; but that grounds of equitable relief may arise other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments, which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances, which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own peculiar circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."

I have looked through the bill in vain to find any allegations of special grounds for equitable relief. It is in the usual form, and simply prays for an injunction, and for an account for profits and damages. The prayer for an injunction is nugatory, as the bill shows upon its face that the patents which are alleged to have been infringed had expired when the suit was commenced.

The case falls within the principle announced in *Root v. Ry. Co.* *supra*.

The demurrer must be sustained and the bill dismissed, with costs.

THE TWO MARYS.

(District Court, S. D. New York. April 4, 1882.)

1. ADMIRALTY PRACTICE—CLAIMANT—RULE 26.

A "claimant" in the admiralty practice, under rule 26, is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested. An "intervenor," under rule 34, is one who, without demanding the redelivery of the vessel, seeks only the protection of his interest in her, or the payment of his claim in the ultimate disposition of the case.

2. SHIPWRIGHT—COMMON-LAW LIEN.

A shipwright in possession under a common-law lien, from whom the vessel is taken upon arrest by the marshal, has an election to appear as a technical "claimant" for the redelivery of the vessel, or as an "intervenor" only for the recognition and payment of his claim; but, having appeared as "claimant" and given a bond for the libellant's demand, he has not a right, as a matter of course, afterwards to change his position to that of an intervenor merely

3. SAME—APPEARANCE AS CLAIMANT.

Where, however, during the pendency of proceedings upon exceptions to the shipwright's right to appear as "claimant," the master, being part owner, also appeared as an adverse "claimant" for the possession of the vessel, and, on application to the court, had received possession upon executing a bond for her value, conditioned for her return to the shipwright or for the payment of his claim, and the determination of the amount due to him, became therefore, involved in the action, *held* that, on the shipwright's application, his right to appear as "claimant" having been determined in his favor, he should be allowed to file his petition setting forth the amount and grounds of his claim, and that the libellant, the adverse claimant, or other part owners, should make answer thereto as advised.

Motion for leave to file petition to intervene and for answers thereto. *Scudder & Carter* and *Geo. A. Black*, for motion.

H. B. Kinghorn and *R. D. Benedict*, opposed.

BROWN, D. J. The libellant, on January 25, 1879, filed a libel for supplies furnished to the *Two Marys* during the year 1878. Process was served upon the schooner while she was in the ship-yard of Hawkins undergoing enlargement and repairs, but she was not then taken into the custody of the marshal. On the sixteenth of September following, while still in possession of Hawkins, as he claimed, she was seized by the marshal upon the waters adjacent to his yard and removed to this city. On September 22d Hawkins filed his claim as a lienor in possession, claiming to be restored to possession, and on the same day gave a bond under the act of 1847 for the libellant's claim, but did not obtain the possession of the vessel thereby, as Crowley, the captain and owner of one-sixteenth, also claimed to

be in possession. The facts appertaining to this controversy have been stated in previous opinions of this court. 10 Ben. 558; *The Two Marys*, 10 FED. REP. 919.

On October 14, 1879, the marshal retook possession of the vessel under the order of this court. On October 20th Crowley filed his claim, stating that he was the master and owner of one-sixteenth; that he was in possession prior to the seizure by the marshal; and demanding that possession be restored to him. He gave a stipulation for costs, but no bond or stipulation for value. On October 24th exceptive allegations were filed to the claim of Hawkins, alleging that he had no lien or interest recognizable in this court. On October 29th Hawkins filed a petition that the libel be dismissed for want of jurisdiction, alleging that the libellant had no lien, to which petition answers were filed by Crowley and libellant, on November 21st, and upon these answers to the petition the libellant and Crowley moved that the said petition to dismiss the libel be itself dismissed. On the eleventh of December the opinion of my predecessor was filed, directing that both motions be denied, and directing a reference upon the exceptive allegations as to Hawkins' right to appear in the suit. An order of reference accordingly was entered on December 23d, and upon the report of the referee this court, in the opinion of March 6, 1882, decided that Hawkins had a common-law possessory lien upon the vessel, at the time of her arrest by the marshal, which entitled him to a standing in this suit. *The Two Marys*, 10 FED. REP. 919.

On December 23, 1879, a further order was entered, denying the motion of Hawkins to dismiss the libel, and the counter-motion to dismiss the petition, which order recited that it was "conceded on the part of Hawkins that his petition was not filed under the thirty-fourth rule, but only as a ground for dismissing the libel, without prejudice, however, to any right he might have by proper proceedings thereafter to intervene under said thirty-fourth rule;" and the order directed that "said petition remain on file as a ground for a motion to dismiss the libel after the determination of the right of said Hawkins to become a claimant herein."

The right to appear in the suit having been now decided in favor of Hawkins, this motion is made in his behalf upon the facts stated in the said petition of October 29, 1879, for leave to intervene under the thirty-fourth rule; that said petition stand as such petition of intervention; that he be allowed to amend the ninth article thereof by inserting the averment that the libellant had no lien for the reason that he was an owner at the time of furnishing the supplies, and that

the prayer of the petition be amended so as to demand the dismissal of the libel, payment of the amount of the lien of Hawkins, or the return of the vessel to him, and that the answers of the libellant and Crowley to the said petition stand as answers to such petition of intervention, and the issues raised thereby be set down for trial or referred.

The motion is opposed by the libellant on the ground that, having taken the attitude of a "claimant" under the twenty-sixth rule, demanding the return of the vessel, and having given a bond under the act for the amount of the libellant's claim, Hawkins cannot be allowed to change his position as that of a mere intervenor under the thirty-fourth rule.

An examination of the papers shows clearly that up to the time of this motion Hawkins has held no other attitude than that of a claimant in the technical sense, in accordance with the claim filed on September 22, 1879, and the bond then given by him for the return of the vessel to his possession. The effect of the bond was to release the vessel so far as respects the libellant's claim, and to substitute the obligations of the bond in its place. Hawkins, as a lienor in possession at the time of the arrest of the vessel, had an election either to appear as a technical claimant demanding possession of the vessel, (*The Jenny Lind*, 3 Blatchf. 513; 2 Conk. Adm. 203,) whereupon he would assume the situation of a defendant as respects the libellant, and as such would be required to answer the libel; or to intervene merely for his own interest, to have his claim paid out of the proceeds of the vessel or secured before her delivery to another claimant. *The Nordstjernen*, Swab. 260. *The Harmonie*, 1 Wm. Rob. 178; *The Two Marys*, 10 FED. REP. 919. In the latter case the petition of intervention stands in the nature of a libel, to which answers may be required from other parties in interest. The two modes of asserting such a lienor's claim are not harmonious, and should not be authorized at the same time as against the same party; certainly not without very strong reasons for such a course, and none such appear in this case as against the libellant, who asserts a lien upon the schooner for supplies furnished to her. Whether she is still in existence or not does not appear, and the libellant's remedy upon the bond given by Hawkins cannot be suffered to be impaired.

As respects the libellant, therefore, no reason appearing for authorizing any change in the position as "claimant" up to this time asserted by Hawkins, the motion should be denied, and any issue as to the libellant's claims should be raised by way of answer to the libel.

As respects Crowley and his representatives the situation is different. He also appeared as technical "claimant" of the vessel, averring that he was the master and owner of one-sixteenth, and that he was in possession at the time of her arrest by the marshal. Subsequently, upon December 31, 1879, upon his application and the consent of the other owners, the marshal was ordered to deliver possession of the vessel to Crowley, upon his filing a stipulation, in the sum of \$7,000, conditioned "that the said vessel should be safely returned, without waste, deterioration, or encumbrance, to the custody of the marshal, under the process in this cause, if the court or any appellate court shall so order, and to await the final decree of the court or of the appellate court; or, in default of such return, if ordered, that the said Crowley will, if the court shall so order, deposit said sum of \$7,000 with such depository as the court shall direct, to be held subject to the same lien or claim on or in it which said Hawkins now has in and upon said vessel." Under this order Crowley gave a stipulation with sureties as required, and received possession of the vessel from the marshal. The vessel, therefore, being no longer in the custody of the court, and the remedy of Hawkins being upon the stipulation given by Crowley, an adverse claimant of the vessel, it is manifest that the rights of the parties cannot be adjudicated without the determination of the amount of Hawkins' claim. A mere answer denying the rights asserted by Crowley would not determine the questions involved. A deposit of money under the stipulation would be but a security for Hawkins' claim, and the amount of his claim must necessarily be determined.

The claimant, Hawkins, should therefore file his petition setting forth the amount and grounds of his claim, to which Crowley, or his representatives, he being deceased, or any other part owners of the vessel who may appear in time, will have leave to answer on filing stipulation for costs. An order may be entered in conformity with this decision.

THE ALBERT SCHULTZ.*

(District Court, E. D. Louisiana. April 11, 1882.)

ADMIRALTY PRACTICE—RESIDUUM IN REGISTRY.

Courts of admiralty recognize legal titles and legal and equitable liens, and after a judgment has been rendered in favor of a party having a claim upon the *residuum* in the registry, it is brought to the notice of the court that an equitable action of nullity has been instituted in a state court to annul the transfer by which said party held title to the claim, on the ground of fraud and simulation, the court of admiralty will order the proceedings in execution of its judgment to pause until the termination of the suit in equity in the state court.

W. S. Benedict, for the claimant of the *residuum*.

Richard De Gray, for plaintiff in the action of nullity.

BILLINGS, D. J. In this case there had been a seizure under admiralty process, and a sale, and a contestation as to the *residuum* or surplus remaining in the registry of the court. At this term of the court there was a judgment recognizing ——— Lipperts as entitled to \$ ——— as assignee of Albert Schultz. A creditor of Schultz has commenced suit in the state court to annul the transfer of this claim to Lipperts on the ground of insolvency, fraud, and simulation. To this suit Lipperts and Schultz have been made parties. The creditor has filed a copy of the record in this court, and has moved for what is equivalent to an order postponing the execution of the judgment in favor of Lipperts until the termination of the revocatory suit. If these suits, the one in this court and the suit to annul, were pending in courts deriving their authority from the same sovereignty, the court having in charge the question of title could properly enjoin proceedings in the court having possession of the fund; but, since one is a federal and the other a state court, this cannot be done. This court, as a court of admiralty, has no equity jurisdiction. It is often said to be a court of equity. The meaning of that expression is that it is a court which is not governed by artificial or technical rules or mode of procedure, and therefore it acts with the spirit of the purest equity and good conscience; but it cannot change the legal relations of parties to property, as can a court of chancery. Even in the execution of its judgments, if it encounters an impediment which requires the action of a court of chancery, it must pause until some other court with suitable powers has acted.

In the matter now before the court, under the law of Louisiana, the creditor instituting this action of nullity has a *quasi* lien, which, if

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

successful in his suit, will ripen into an absolute right. In the distribution of the funds which form a *residuum* in the registry, courts of admiralty recognize legal titles, and legal and equitable liens. I think, therefore, though there is no precedent, a case is presented where this court should pause in the execution of this judgment until the termination of the suit in equity.

Let the judgment be amended by adding: "But it having been properly called to the attention of the court that an equitable action is pending for the determination of the title to the claim or interest of the said Lipperts, so far as relates to the amount adjudged to him, it is ordered, adjudged, and decreed that the execution of the judgment be postponed until the further order of this court."

THE ENRIGHT.

(District Court, N. D. Ohio.)

RAISING SUNKEN VESSEL—LIEN.

Where a party contracted to raise a sunken scow for a certain amount of money, hold her up for a certain amount per day, and pull her out for a certain stipulated price, and the contracts were severally performed in the time stipulated, no part of the service thus performed was salvage service, but should rank for lien with repairs and supplies.

Libel for Salvage Service.

Robison & Kidd, proctors for libellants.

John F. Weh, for defendant.

WELKER, D. J. The defendant, on the seventeenth day of October, 1874, loaded with stone at Clough's dock, five miles from Black River, for Toledo, and started on her trip. After getting a few miles out the weather became inclement. She began to leak, her pumps were used, and the master decided to put into the port of Black River. In going in the vessel struck the pier, but got in, the pump being used until she reached the dock, a few minutes after reaching which, in consequence of her leaking condition, she sank in 12 or 14 feet of water, all of which occurred on the day and evening of the aforesaid date. On the nineteenth day of October, 1874, the libellant and the master and owner entered into written contracts to raise the vessel, and draw her upon the bank of the river for stipulated amounts, to-wit, \$675 to raise her, \$50 per day for holding her up, and \$200 for pulling her out. The contracts were severally performed by the libellant in the time stipulated, and the evidence showed that the

vessel was not in the way of the navigation of the river, and would not have been materially damaged if she had remained in the river until the spring following. *Held*: (1) That no part of the service thus performed was salvage service, and thereby superior to seamen's wages. (2) That it was contract service, and should rank for lien with repairs and supplies.

Decree accordingly.

THE ORIENT.

(*Circuit Court, S. D. New York.* August 18, 1881.)

DECREE—OMISSIONS IN—REVERSAL.

Where there was a stipulation that the intervenors should pay all costs and expenses which should be awarded against them, and the final decree awarded no costs or expenses against the intervenors, notwithstanding there was a deficiency in the proceeds to pay all the costs and expenses, the decree must be reversed.

Beebe, Wilcox & Hobbs, for libellants.

E. D. McCarthy, for intervenors.

BLATCHFORD, C. J. The stipulation of November 1, 1879, was that the intervenors should "pay all costs and expenses which shall be awarded against them by the final decree of this court, or, upon appeal, by the appellate court." The final decree of November 29, 1879, in the district court, gave a recovery for \$749.68 to the libellants against the steam-boat *Orient*, which amount included certain costs, taxed in favor of the libellants at \$127.20, (that amount including fees of proctor, clerk, and commissioner,) and the fees of the marshal, taxed at \$251.49; but said final decree awarded no costs or expenses against said intervenors. It ordered that out of the moneys in court the clerk first pay the cost of the officers' court, and then pay the balance on account of the amounts decreed to the libellants. On the face of it it contemplated a deficiency by using the words "on account of." It was known to all parties that the proceeds in court were \$615, and that there must be a deficiency of \$144.38; yet there was no award for costs, or for any part or the whole of the deficiency, against the intervenors. The decree must be taken to have been made with knowledge of its provisions and effect. It was not appealed from, and was acquiesced in. If it was erroneous or inadvertent the libellants should have had it corrected

by the district court. There is nothing purporting to correct it, or to award any costs against the intervenors. The order of March 29, 1880, and the decree and summary judgment of May 17, 1880, cannot be construed as making such correction or awarding any such costs.

The appellants are entitled to a decree reversing the said decree and summary judgment of May 17, 1880, with costs in both courts, to be taxed against the libellants.

THE HENRY P. DEWEY.

(District Court, E. D. New York. December 10, 1880.)

NEGLIGENCE—INJURIES TO THE PERSON—ACCIDENT.

Where it is shown that an injury to the person was caused by an accident, and was in no way attributable to a neglect on the part of those in charge of the ship, the libel will be dismissed.

Schwarin & Crowell, for libellant.

Beebe, Wilcox & Hobbs, for respondent.

BENEDICT, D. J. The weight of the evidence is that the libellant's fall from the foretop-mast yard was not caused by the breaking of a becket, as alleged, but was an accident in no way attributable to any neglect or failure of duty on the part of those in charge of the ship.

The libel is accordingly dismissed, with costs.

HAZLETON and others v. MANHATTAN INS. Co.

(District Court, N. D. Illinois. April 24, 1882.)

1. GENERAL AVERAGE—JETTISON—CONTRIBUTION BY INSURER.

Where the libellants show that the cargo put on deck was properly stowed, and the respondent, who was the insurer of the hull, offered no proof to show that it could have been stowed in any better or safer manner there, he is liable to contribution on general average for a necessary jettison of such deck load.

2. UNDERWRITER ON HULL—LIABLE TO CONTRIBUTION—CUSTOM AND USAGE.

The underwriter upon the hull is liable to contribute to general average for jettison of the deck load when the custom or usage of the trade in which the vessel is employed is to carry part of her cargo on deck.

3. INSURANCE—CONTRACT CONSTRUED—USAGES OF TRADE.

Where the insurance was for the season, the policy running as a marine risk, and the vessel was to be employed in the freight and passenger business, it is a necessarily-implied part of the contract of insurance that in the conduct of her business she would conform to the usages of the trade in which she was engaged; and it being clear that it was an established usage to carry part of a cargo like that in question upon deck, and that it was deemed not only convenient but prudent to do so, the court must assume that the underwriter intended or contemplated that part of a cargo like that in question would be stowed on deck, and that he assumed all the dangers and advantages of such usage.

4. SAME—PROVISION FOR ADJUSTMENT.

Where the policy provides that it is "subject to the usages and regulations of the ports of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses designated by the insurers," it is to be construed only to refer to the manner of making adjustment when liability exists, and does not control the question of the extent of the liability of the underwriter upon his contract; and where the underwriter had ample notice of the loss, and neglected or refused to designate an adjuster, he cannot object that the adjuster who made the general average was not designated by the company.

Schuyler & Kremer, for libellant.

Rae & Smith, for respondent.

BLODGETT, D. J. This is a libel by the owners of the schooner *Melvina* against the respondent, as underwriter on the hull of the schooner, for a general average claim by reason of the jettison of a quantity of pig iron from the deck of the schooner.

The material facts as they appear in the record are:

That on the eighth of November, 1880, the schooner *Melvina* took on board at Elk Rapids, Michigan, a cargo of pig iron for the port of Chicago, about 406 tons of which was stowed under deck, and about 61 tons, with the consent and knowledge of the shipper, was stowed on deck. The schooner was in all respects sea-worthy and properly manned when she commenced her voyage from Elk Rapids for Chicago. The weather was stormy and cold, and she was compelled to take refuge for several days in the harbor of Ludington, and while there snow and sleet fell almost continually. On the twenty-third of November she left Ludington in a sea-worthy condition, and properly manned, in prosecution of her voyage to Chicago. During the night of the 23d it became very cold, and a severe wind and snow storm set in, and the vessel became loaded with ice. The tiers of iron piled along the deck were drifted full of snow and ice, so that the water which came on board did not run off freely through the scuppers, and the vessel was in danger of foundering; and to save the lives of her crew, the vessel, and her cargo below deck, her deck load was jettisoned. Thus relieved the schooner rode out the storm in safety, and made her port of destination with the remainder of the cargo, where due protest and notice for general average was made.

The Manhattan Insurance Company, respondent in this case, had issued a policy upon the hull, tackle, apparel, and furniture of the schooner for the sum

of \$3,000, insuring the schooner against the perils of navigation, jettison, etc., which policy was then in force; and the amount charged against this policy by the adjuster in making the general average was \$293.39, which the respondent, after due notice and demand, refused to pay.

The proof also shows without contradiction that it is usual and customary for vessels engaged in carrying pig iron on these lakes to stow a portion of the cargo on deck, for the reason that it "makes the vessel work easier in the sea and without straining;" the proof tending to show that where the entire cargo consists of iron about 15 per cent. is loaded on deck. The proof also shows, and without contradiction, that the iron in question was properly stowed upon the deck, being piled in tiers next the bulwarks.

The respondent denies its liability—*First*, because the peril which made the jettison necessary was occasioned by the choking of the scuppers by snow and ice which gathered on and among the iron by reason of its improper stowage; *second*, because the insurer of the hull is not liable to general average for a jettison of the deck load; *third*, because the policy provides that "in case of loss the adjustment shall be made according to the usage and rules of the ports of New York, and by an experienced adjuster to be selected by the underwriter;" and it is admitted, by stipulation filed in this case, that by the usage of underwriters of the port of New York "the loss of a deck load would not be adjusted as a general average loss."

As to the first of these points it is sufficient to say that the libellant's proof shows that the cargo put on deck was properly stowed on deck, and the respondent has offered no proof to show that it could have been stowed in any better or safer manner there. The validity of this objection, it seems to me, must depend on whether the iron was rightfully stowed at all on deck. If it was rightfully there, the proof seems to show that it was properly placed; that is, it is not shown to have been in a wrong or improper place on deck. The proof does not show that it was alone the clogging of the scuppers by snow and ice among the iron that had weighted the vessel down, so that she would not rise to the sea, and was in danger of foundering, but her whole rigging and hull were loaded with ice as well as her deck. It is likely that the closing of the scuppers increased the accumulation of ice; but I conclude from the proof that if the scuppers had been free there would still have been a large quantity of ice on the vessel, and a necessity for throwing off the deck load to save her from foundering. Indeed, from the proof I think it probable that it was fortunate for all on board of this vessel, and all interested in her hull and cargo, that she had a portion of her cargo on deck, where it could be promptly jettisoned, and that had the whole cargo been below deck the vessel would probably have foundered before enough of the cargo could have been got overboard to relieve her.

As to the second point, that the insurer of the hull is not liable to general average for a jettison of deck load, the question has been so ably and thoroughly examined and discussed, in the light of the authorities in the report of the commissioner, that I do not deem it necessary to do more than state that I concur in his conclusions. It is true, there would seem at the first glance to be some conflict of authority upon this point, but after a careful examination of the cases cited by the commissioner, and by the proctors in their briefs, I think the rule fairly deducible from the modern cases is that the underwriter upon the hull is liable to contribute to general average for jettison of the deck load, when the custom or usage of the trade in which the vessel is employed is to carry part of her cargo on deck.

In 1 *Parsons, Shipp. & Adm.* 354, it is said:

"The rule that the jettison of goods carried on deck gives no claim for contribution, is founded upon the reason that they ought not to be there. Whenever it is proper to carry the goods on deck it might seem to be proper that the voluntary sacrifice of them should be contributed for. The propriety of so carrying them should be determined in any case, we think, by custom."

On page 356 of the same work the author says:

"We apprehend the rule should be that whenever, from the peculiar nature of the goods or of the voyage, or, in fact, for any reason, a custom exists to carry goods on deck, and this custom was well established and known, it would bind all the parties interested."

The insurance in this case was for the season, the policy running as a marine risk from the first of April to November 30th; and the schooner was to be employed in the freight and passenger business in the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, St. Clair, Erie, and Ontario. It is a necessarily-implied part of this contract of insurance that, in the conduct of her business, she would conform to the usages of the trade in which she was engaged.

In *Pelly v. Royal Exchange Ass'n Co.* 1 Burr. 341, Lord Mansfield said:

"The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged. He took the risk upon the supposition that what was usual or necessary would be done. * * * And in general what is usually done by such a ship with such a cargo in such a voyage is understood to be referred to by every policy, and to make a part of it as much as if it was expressed."

It being clear, then, that it was an established usage to carry part of a cargo like this upon deck, and that it was deemed not only convenient but prudent to do so, the court must assume that this underwriter intended or contemplated that part of a cargo like this would be stowed on deck, and assumed all the dangers and advantages of such usage.

It is urged by the learned proctors for the respondent that the usage must not only extend to the carrying of cargo on deck, but also a custom of the underwriters to contribute by general average for a cargo so carried must be established. But I do not think the custom of the underwriters to pay can be considered as in any respect controlling or modifying the rule as laid down. The underwriter must adjust himself to the custom of the trade which he insures, and the mere fact that the underwriter refuses to pay can have no bearing upon the question of his obligation and liability. He insures the vessel to engage in the trade in which she is to be employed according to the usual methods in which that trade is conducted, and must be presumed to have understood and contemplated the ordinary usages of loading and stowing cargo.

As to the third point, that the respondent is not liable because the policy provides that it is "subject to the usages and regulations of the ports of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses designated by the insurers." By a stipulation filed in the case it is admitted that according to the usage of the port of New York the loss of a deck load would not be adjusted as a general average loss. This clause I construe only to refer to the manner of making the adjustment when a liability exists, or is admitted, and does not control the question of the extent of the liability of the underwriter upon his contract.

This clause does not inject into this contract the usage of the port of New York as to the liability of the insurer to contribute for jettison of deck load, for that must be settled by the usage of the trade in which the ship insured was to be employed; but the office of this clause is to make the rule of distributing the loss among those liable to a general average contribution such as is used in the "ports of New York," which I think includes not alone the port of New York city, but all the ports of the state of New York, including Buffalo and Oswego and other lake ports, as well as New York city.

The extent of the underwriter's liability on this policy is a question of law under the facts, and is not to be settled by the rules of adjustment in any particular locality. So, too, as to the suggestion that the underwriter had the right to name the adjuster to make this general average adjustment. The proof shows that the respondents had ample notice of the loss, and if they had claimed the right to appoint or select an adjuster, we must presume it would have been conceded to them; but they having neglected or refused to designate an adjuster, this objection, that the adjuster who made the general average was not designated by them, comes to late.

I conclude, then, from the authorities which I have examined and the facts in the case, that there can be no doubt of the liability of this respondent to contribute upon this general average account. The jettison was made for the interest of all concerned. There can be no doubt under the proof that by this jettison the hull upon which this policy rested, and the remainder of the cargo, as well as the lives of the crew, were saved; and I can see no reason why those who are interested in the hull as underwriters should not contribute their *pro rata* towards paying for a proper sacrifice for the common good.

There is a further view of this case which it seems to me may help us by illustration in arriving at a correct conclusion. The policy provides that the underwriter "shall not be liable in cases of loss or damage by reason of the incompetency of the master or insufficiency of the crew, or want of due care and skill in navigating the vessel, and in *loading, stowing, and securing the cargo of the vessel;*" it being an established or conceded fact that stowage of a portion of a cargo of this kind on deck is necessary or prudent for the purpose of securing the easy and safe management of the vessel. Suppose this entire cargo had been stowed below deck and a total loss had occurred in the storm when this jettison was made, could not these respondents have successfully resisted payment upon its policy on the ground that due skill and ordinary care had not been used in the stowing of the cargo, and that as a measure of safety a portion of this cargo should have been stowed upon the deck, both for the reason that it balanced or trimmed the vessel so as to make her sail better and ride the seas easier, and the further fact that a jettison, if necessary, could be more promptly made?

It seems to me, at least, if this cargo had all been stowed below decks, and the vessel had been lost, it is more than probable that the payment of the policy would have been resisted, and perhaps successfully, upon the ground of improper stowage.

THE QUEEN OF THE EAST.*

(Circuit Court, E. D. Louisiana. May 3, 1882.)

1. ADMIRALTY—TOWAGE.

Payment for towage from and to sea, under a contract in which the time for payment for the same is not specified, is due in the port of New Orleans, under the custom thereof, prior to the ship's being towed back to sea.

2. SAME—USAGE AND CUSTOM.

It is well settled that, in all maritime contracts, usage or customs is always applicable and binding on the parties to explain doubtful and supplement incomplete agreements and stipulations.

3. SAME—LIEN FOR TOWAGE.

As there was performance of the contract for towage, the libellants had a lien upon the vessel for the full amount due them.

The Prince Leopold, 9 FED. REP. 333, distinguished.

E. D. Craig, for libellants.

E. W. Huntington, for defendants.

PARDEE, C. J. The facts of the case are:

That in December, 1880, off the mouth of the Mississippi, the master of the ship *Queen of the East* contracted with the master of the libellants' tow-boat Confidence to tow the said ship to the port of New Orleans and back to sea for 35 cents per ton. No specification was made as to when the towage was to be paid, nor as to the proportion to be paid for up towage as against down. The ship was accordingly towed by libellants' boat to the city, whereupon a bill was made out by libellants' agents for the full amount of the towage, which bill was presented to the master of the ship, was approved by him, and then presented to and left with the ship's consignees and agents for payment. The agents refused to pay the bill, whereupon a demand for payment was made on the master of the ship, who also refused to pay until the ship should be put to sea. In February following, the ship being ready to sail, notice being given to the tow-boat's agents, the libellants' tow-boat went along-side and tendered performance of the down towage, on condition that the bill should be settled before leaving port. Payment was refused by the master, who declared that he had the money and would pay when the ship was put to sea, and by the agents, who offered their written guaranty that they would pay when the ship was put to sea. Thereupon the tow-boat left, and libellants instituted proceedings to libel the ship for the full amount of towage and one day's demurrage. The ship gave bond, and procuring another tow-boat, at a cost of \$250, about double the ordinary towage, went on her voyage. Her claimants file a cross-libel, claiming from the tow-boat the amount paid for down towage, and for three days' demurrage on account of delays caused by the alleged failure of the libellants to perform their contract. The evidence further shows that the tonnage of the *Queen of the East* was about 1,227 tons; that the proportion of up towage to down towage is about two to one; and that when

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the towage from sea to sea is fixed at 35 cents, 25 cents is the proper proportion for the up towage, and 10 cents for the down towage. The evidence of tow-boat men, ship-agents, and ship-brokers establishes that when contracts are made for the round towage, and no stipulation made for time of payment, the generally-followed rules and usages are that the proportion for up towage is payable within a few days after the ship arrives in port, and the balance for down towage before the ship is towed from port.

From this statement of facts it seems clear that the rights of the parties in this case are determined when it is determined as to the time the towage contracted between them was payable. They could have made any stipulation as to time and mode of payment they had seen fit. Not having stipulated in that regard, the ordinary rule that payment for services is not exigible until after the services are rendered will prevail, unless—*First*, there is a custom of the port fixing the time of payment in regard to contracts for round towage; and, *second*, such custom is binding on the parties.

I have found from the evidence that there was a well-defined rule or usage that in such contracts the whole towage was payable before the ship left port, and I am satisfied that that rule or usage was known, certain, and reasonable. It was certainly a reasonable usage, for the tow-boat, being always within the jurisdiction of the court, any fault or neglect on her part could always be prosecuted; while a default on the ship's part could only be remedied by pursuing her to foreign ports, or trusting to her some time returning. And then the high seas, perhaps in storm and heavy seas, is not the most convenient place for the adjustment of financial accounts and differences, particularly where, in cases like this under consideration, each party (as the evidence shows) suspected trickery on the other side, and determined that he would be safe, whoever else was left in the lurch. In short, a settlement in port protects both sides, while a settlement at sea would leave the ship mistress of the situation.

That this rule was known to the master of the ship there can be no doubt, since he had previously twice visited the port, and he followed the rule and approved the tow-boat's bill for the full amount, which is utterly irreconcilable with any idea in his mind that the towage was not to be paid except by himself after his ship had been put to sea. And it seems clear that the agents and consignees of the ship were also aware of the rule, else why did they entertain the bill, and why was it that, as the evidence shows, they only provided the master with greenbacks to pay after the issue had been fully made between the master of the ship and the master of the tow-boat?

There is no suggestion of illegality in regard to any such usage. I understand it to be well settled that in all maritime contracts usage or customs are always applicable and binding on the parties to explain doubtful and supplement incomplete agreements and stipulations.

"The principle on which evidence of usage is admissible for such a purpose is that the parties have not set down the whole of their contracts in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which in reason they must be understood to contract, unless they expressly exclude them." See *Maclachlan*, 384.

"And custom or usage may be proved, not only to explain the meaning of terms to which a peculiar and technical meaning is thus affixed, but also to supply evidence of the intentions of the parties in respect to matters with regard to which the contract itself affords a doubtful indication, or *perhaps* no indication whatever. And therefore an established and well-known custom may add to a contract terms or stipulations not contained in it." See *1 Wait, Ac. & Def.*, 128 *et seq.*

From all of which it seems that as the parties in the contract of towage were silent as to the time the towage was payable, they are presumed to have contracted according to the usages of the port with reference thereto, in which case the ship and her agents were in default in not paying before the ship left port. The libellants performed the larger part of their contract, and made due and sufficient tender of the remainder, and were only hindered from full performance by the default of the ship. The libellants are entitled to pay as if they had fully performed. They are not entitled to demurrage for being compelled to go down the river light, as they recover the same amount as if they had towed down the Queen of the East. The respondents, being in fault, are not entitled to recover anything for the ship's increased expenses, such expenses being clearly the fault and laches of the ship's agents and master.

Some arguments were made at the hearing that the libellants were not entitled to judgment *in rem*, as they had no lien particularly for any amount the ship might owe for down towage, as that towage was not performed. This court has held that an unexecuted contract for towage made by the ship's agent in port gave no lien. See case of *The Prince Leopold*, 9 FED. REP. 333. In that case there was no performance nor even tender of performance. In the case now under consideration there was part performance, and, as is shown

by the evidence, the towage contract was one towage from sea to sea. The contract must be treated as a whole, and as there was performance the contract for towage cannot be said to be unexecuted. The libellants have a lien for the full amount due them.

Let a decree be entered in favor of libellants for the sum of \$429.45, with legal interest, 5 per cent., thereon from February 19, 1881, with costs in both courts.

HARDING and others v. INTERNATIONAL NAVIGATION CO.*

(Circuit Court, E. D. Pennsylvania. April 10, 1882.)

1. COMMON CARRIER—THROUGH BILL OF LADING—LIABILITY FOR DAMAGE BY INDEPENDENT CARRIER.

Each carrier on a through bill of lading, is liable only as respects his own line, in the absence of a different understanding.

2. SAME—TRANSPORTATION BY LIGHTERS BETWEEN WHARVES OF TWO STEAM-SHIP LINES.

Where a carrier operating a line between Antwerp and Philadelphia issued a through bill of lading from Antwerp to Boston, stipulating that the goods were to be transported to Philadelphia by steamer, and from thence to Boston, either by water or rail, and that the responsibility of each carrier should be limited to each line, *held*, that it was not liable for injury to the goods on board of lighters which it had employed to transport the goods three miles by water from its wharf in Philadelphia to the wharf, in the same city, of a steam-ship line to Boston.

3. SAME.

The employment of the lighters in such case *held* to be not ordinary light-erage service, but a carriage by water over a necessary part of the route to Boston.

Libel by George W. Harding and others against the International Navigation Company, to recover for injury to goods of plaintiffs carried by defendants. The facts were as follows:

The International Navigation Company was a Pennsylvania corporation, operating, between Antwerp and Philadelphia, a line of vessels owned by the Societe Anonyme de Navigation Belge-Americaine. In November, 1879, it received at Antwerp a quantity of wool consigned to libellants at Boston, and issued therefor a bill of lading headed, "Through Bill of Lading of the International Navigation Company, via the steam-ships of the Societe Anonyme de Navigation Belge-Americaine, between Antwerp and Philadelphia, and the Pennsylvania Railroad Company and its connections, or other railroad companies or steamers or *lighters*, from Philadelphia to point of destination." "From Antwerp to Boston, via *Philadelphia*."

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

The material parts of the contract set forth in the bill of lading were as follows :

"To be transported from Antwerp to Philadelphia by the steam-ship *Nederland*, (with the privilege of calling at Southampton,) and delivered to the International Navigation Company (Red Star Line) at the port of Philadelphia, and thence to be transported by rail, steam, or sail, at the option of the said International Navigation Company, to Boston, U. S. A., and delivered in like good order unto order, or to ——— assigns, on payment of the freight and charges thereon.

* * * * *

"The responsibility of each carrier shall be limited to its own line.

* * * * *

"It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage."

The wool arrived safely at Philadelphia and was unloaded at the wharf of respondents at Girard Point, Philadelphia. Respondents then employed R. Patterson & Son, the owners of a number of lighters used in harbor transportation, to transport the wool to the wharf of the Boston Steam-ship Company, also in Philadelphia, but three miles distant from respondents' wharf. The lighters were unroofed barges, such as were ordinarily used for harbor transportation, it being customary to protect perishable cargoes while on board of them by means of tarpaulins. While the wool was being thus transported to the wharf of the Boston Steam-ship Company it was damaged by rain in consequence of not being properly protected by tarpaulins, and was shipped to Boston and delivered to libellants in this damaged condition. Libellants then filed this libel to recover their loss by such damage.

John D. Bryant and Henry Flanders, for libellants.

Morton P. Henry and R. C. McMurtrie, for respondents.

BUTLER, D. J. Notwithstanding the existence of contrary decisions, it is quite well settled in this country, that each carrier on a through bill of lading is liable only as respects his own line, in the absence of different understanding. Such different understanding may be shown, however, either by express contract, or the existence of circumstances from which it should be inferred: *Lawrence, Carriers*, § 24; *Redfield, Carriers*, § 180. That such is the rule in the federal courts is shown by *Railroad Co. v. Pratt*, 22 Wall. 123.

In our case the carriage was on a through bill from Antwerp to Boston, via Philadelphia. The respondents' line, (to which the *Nederland* belonged,) terminated at Philadelphia, from which point the transportation was to be continued by water or rail, and necessarily through the agency of other carriers. From Philadelphia to Boston, therefore, respondents' relation to the shippers was not that of

carriers, unless they contracted to assume it. In the absence of such contract they were forwarders, simply. As before stated, such a contract may be shown by express stipulation, or by inference from circumstances. Here there was no express stipulation to this effect. There are circumstances, (such as collecting freight in advance for the entire route, etc.,) which, standing alone, might justify an inference that the respondents contracted as carriers throughout. But such inference is completely repelled by the terms of the bill of lading. The respondents, unwilling, as it appears, to trust their responsibility respecting the transportation beyond Philadelphia, to the conclusion of law before stated, or to incur the danger of inferences of fact such as have just been referred to, expressly stipulated that "the responsibility of each carrier shall be limited to each line," and that "in case any loss, detriment or damage done to, or sustained by any of the property herein receipted for, during such transportation, whereby any legal responsibility shall or may be incurred, that company shall alone be answerable therefor in whose actual custody the same may be at the time of happening of such loss or damage." However significant the circumstances referred to might be in the absence of this stipulation, with it they are unimportant. Nothing is left to inference. That this stipulation encounters no legal objection is plain. It corresponds, as we have seen, with a legal presumption.

The case of *Hooper v. Wells*, 27 Cal. 11, cited by the libellants, contains nothing new. The defendant, an express company, was a carrier throughout the journey. Not only did it undertake to *deliver to the consignee*, but the carriage was over its own route the entire distance, and the property was in the *hands of its own messenger* when lost. That it did not own or control the vessel on which the messenger traveled, was unimportant. The defendant limited its responsibility by stipulating that it was a "forwarder," simply; and the construction of this stipulation gave rise to the only question in the case. It was construed to have the same effect as the ordinary stipulation required by forwarders against risks peculiar to their obligation, relieving them from everything save the consequences of negligence. This the court held to have been the intention of the parties, saying, "The stipulation simply means that the defendant would not assume the extraordinary responsibility of common carriers and become insurers. * * * There is no stipulation against negligence on the part of defendants or their employes in transmitting the goods. The limit is fixed by reference to another class of

bailees, * * * and the meaning as we construe it, is that the defendants will be governed in respect to liability by the same rules as are applicable there—to forwarders.” The court further says the printed words in the contract “not to be liable beyond our route,” are inapplicable and without effect, because “the defendants’ route extended the whole distance.” The case I repeat contains nothing new.

It is urged, however, that a distinction should be made between the carriage from Girard Point, (where the *Nederland* discharged,) to the Boston Steam-ship Company’s wharf,—three miles distant,—and the carriage thence to Boston; that the former, at least, was by the respondents, through their agents; and as the negligence complained of occurred here they are responsible. I cannot, however, adopt this view. That the merchandise was carried between these points, in “lighters,” is of no consequence. It was not ordinary lighterage service. It was a carriage by water, over a necessary part of the route to Boston. That the appropriate vessels were “lighters” is unimportant. The respondents had no line over this part of the route. They did not do the carrying, and had no means of doing it. It was just as necessary to forward by other, independent carriers, here, as over the balance of the route to Boston. The distance has no influence on the question. Patterson & Sons, to whom the merchandise was delivered, are reputable transporters, wholly independent of the respondents, having appropriate vessels, for the service required, plying between these points. The respondents, therefore, were justified in making delivery to them; and they were no more the respondents’ agents than was the Boston Steam-ship Company in the subsequent transportation. They are distinctly within the terms of exemption quoted from the bill of lading, and as distinctly within its spirit. The respondents were unwilling to assume the duties and responsibilities of carriers where they had not the means of carriage, and could not therefore control the agencies employed. To guard against misconception they had this inserted in the contract. They had no more control over the agencies employed between Girard Point, and the steam-ship company’s wharf, than over those employed between the latter point and Boston. Appeal is made to the interest manifested by respondents in the transportation by the “lighters,” as evidence of their understanding of the contract. If the contract was open to the interpretation claimed, and this manifestation of interest stood alone, it might be entitled to some weight. The contract, however, is not open to such interpretation; and if it were

the respondents' correspondence at the time shows that they did not so understand it. The interest manifested, therefore, must be attributed to the respondents' zeal in the shippers' or consignees' welfare.

The libel must be dismissed with costs.

THE SEBASTIAN BACH.*

(District Court, E. D. Pennsylvania. March 21, 1882.)

1. CONTRACT—TOWAGE—UNREASONABLE DETENTION.

In a suit by a tug for the contract price for services, and for damages for detention under a contract for towage services stipulating that the vessel might stop to sheathe, the evidence held not to sustain the allegation of unreasonable delay in sheathing.

2. SAME—WILLINGNESS TO PAY FOR TOWAGE—COSTS.

It appearing that respondents had been at all times willing to pay the contract price for the towage, the costs were put upon the libellant, notwithstanding the fact that no technical tender had been made.

Libel by the master of the tug Juno against the bark Sebastian Bach, to recover compensation for towage services, and damages for detention. The facts were as follows:

The tug spoke the bark as the latter was entering the capes of the Delaware about noon on January 25, 1881, and it was then agreed between the master of the bark and the master of the tug that the tug should tow the bark to Philadelphia, but that the latter should have the privilege of stopping at the breakwater to sheathe, as the river was full of ice. About an hour afterwards the bark anchored at the breakwater, and during the afternoon obtained and sawed lumber with which the next morning she was sheathed, the work being completed about 11 o'clock A. M. It was then too late in the day to start, and it was resolved to wait until 3 o'clock the next morning, which was done. The tug, on the arrival of the vessel at Philadelphia, presented two bills,—one for the towage service, and one, for \$150, for detention, alleging that the bark ought to have had the sheathing completed in time to have started early on the morning of the day after her arrival at the breakwater. The respondent declined to pay for the detention, but was willing to pay the bill for towage, although no formal tender was made.

H. G. Ward, for libellant.

Curtis Tilton and *Henry Flanders*, for respondent.

BUTLER, D. J. The claim is not sustained by the evidence. At the outset it was rested on an express contract to be ready to start next morning at 3 o'clock. Failing in this it is now put upon an

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

implied contract to be ready within a reasonable time, and an allegation that the respondent was not so ready. It certainly was his duty to suffer no unnecessary delay in getting ready. But the evidence fails to show that he did suffer any unnecessary delay. To discuss it would be useless. It is true that the Whiting, which entered the Breakwater near the same time with the "Bach," got ready much earlier—working until about 12 o'clock at night. She was a smaller vessel, however, and had all her preparations made for the work when she entered, while the "Bach" had to seek and procure materials. But that it is not usual to make such haste, and do such work at night, as the Whiting did, would seem to be shown by the libellant's witness Minford, master of the Whiting's tug. He says: "The Whiting sheathed that night, because I told the captain the way the weather was I thought if he would sheathe his vessel that night he would get up without trouble, and make an early start in the morning, which he did." If the habit or custom was to do this work at night, Mr. Minford would have expected it to be done, and said nothing on the subject. He clearly recognized the option of the Whiting to do it or not. That the libellant did not expect the work on the Bach to be done earlier than it was, would seem quite clear from his failure to hurry it up, or complain, at the time.

Although the compensation for towing is included in the suit, the only subject of controversy is the one discussed. The respondent has at all times been willing to pay this compensation, and the libellant has so understood. It is not very important whether a technical tender was made or not. It was the demand for alleged detention, alone, that caused the litigation. While therefore the libellant must have a decree for the towage, the respondent should have costs. He has succeeded as respects the only subject in controversy.

THE T. A. GODDARD.

(District Court, S. D. New York. May 5, 1882.)

1. CHARTER-PARTY—LIABILITY OF OWNER—DAMAGE TO CARGO.

The owners of a chartered vessel, retaining control of her navigation, are liable for injuries to a part of the cargo occasioned by unaccustomed and dangerous goods subsequently taken aboard.

2. SAME—GENERAL SHIP—CARGO OF—LIABILITY FOR TAKING DANGEROUS GOODS.

A general ship may carry such goods as are usually carried if due care is exercised in properly separating and stowing articles which might naturally injure each other; but the ship will be held to take at her peril goods known to be dangerous to merchandise previously shipped, or not usually carried in the same cargo.

3. SAME—BILL OF LADING—RECITALS IN, BINDING AS TO EXTERNAL CONDITION.

The scent of camphor in teas so strong as to be readily perceived in handling the packages is an *external mark* of their condition; and the recital in the bill of lading that such teas were "received in good order," is therefore *prima facie* evidence that they were not so scented when shipped aboard.

4. CARRIER OR FORWARDER—AS BAILEE.

A carrier or forwarder of goods as bailee is not the general agent of the owner; his possession is no *indicia* of ownership or of any general authority over the goods except such as is strictly incident to his duties as carrier, and third persons dealing with him do so at their peril. After delivery, pursuant to contract, to another carrier who has notice thereof, he has no authority subsequently to dispense with any of the conditions for safe transportation, and the shipper will not be bound thereby.

5. CHARTER-PARTY—AUTHORITY TO RELET VESSEL.

Where a charter-party authorizes the charterer "to relet the vessel in whole or in part," the charterer is authorized to make subcontracts of affreightment and to sign bills of lading to shippers of goods from other ports which he may procure to be forwarded by other vessels to be transhipped upon the chartered vessel pursuant to the charter; and the ship will be bound thereby from the time they are received on board with knowledge of the facts. Such bill of lading is a reletting of the ship in part.

6. SAME—TRANSHIPMENT—MASTER CHARGEABLE WITH KNOWLEDGE OF SHIPPERS' RIGHTS.

Where R. & Co. chartered the bark T. A. G. under such a charter-party for a voyage from Hong Kong to New York, and thereafter procured teas to be shipped by P. & Co. at Foochow on board the steamer O., to be carried to Hong Kong, and there transhipped on board the T. A. G., and thereafter carried to New York, for which a bill of lading was accordingly given at Foochow for the whole voyage, signed by R. & Co. and the master of the steamer upon terms in conformity with the charter-party, and the teas were afterwards duly transhipped on board the T. A. G. at Hong Kong, and the master gave a bill of lading therefor to R. & Co. which recited the amount of the freight as "through rate from Foochow," and the master thereafter took camphor aboard at the request of R. & Co., being dangerous goods and unaccustomed to be taken with teas, by which the teas were damaged during the voyage to New York, *held*, that the master was chargeable with knowledge of the shippers' rights and that the bark was liable *in rem* for the damage to the teas, and that the request of R. & Co. to take the camphor aboard was no defence.

7. SAME—BILL OF LADING—IRREGULAR IN FORM.

The second bill of lading taken by R. & Co., though irregular in form, did not prejudice the rights of the shippers or of the libellants, their representatives.

8. SAME—CARRIER BY WATER—LIABILITY OF.

A carrier by water is liable to the owner for the safe transportation of goods received on board, independent of any bill of lading; and the owner may proceed directly against the vessel or her owners, through whom the loss or injury occurs, though the latter have a contract with an intermediate party.

9. SAME—STIPULATIONS CONSTRUED.

The stipulation of a charter-party that the vessel should "employ the charterers' stevedore," does not affect the liability of the ship or her owners where the master has the direction and control of the stevedore and the stowage.

This libel was filed to recover the amount of damages to 959 packages of tea on board the bark T. A. Goddard, alleged to have been injured by camphor on a voyage from Hong Kong to New York. The tea was shipped at Foochow, December 18, 1877, by Purdon & Co., on board the steamer Orestes, under a bill of lading which recited that the "teas were shipped at Foochow on board the steamer Orestes for transshipment at Hong Kong on the good vessel called the 'T. A. Goddard,' whereof Smith is master for this present voyage, now lying at Hong Kong and bound for New York; * * * to be delivered at New York to the order of Brown Bros. & Co. on payment of freight * * * at the rate of £1 15s. per ton of 40 cubic feet." This bill of lading was signed by the master of the Orestes, and also by Russell & Co., who thereby contracted for the delivery of the goods at New York.

Russell & Co. had, prior to this shipment, on November 20, 1877, obtained a charter-party from the owners of the T. A. Goddard, then lying at Hong Kong, whereby they had chartered her for a voyage from Hong Kong to New York, for the carriage of merchandise, upon the conditions and exceptions in the usual bills of lading, whereby the owners agreed to keep her well manned and found, and to receive from the charterers at Hong Kong lawful merchandise not exceeding 1,000 tons of 40 cubic feet; cargo to be well stowed and dunnaged at the ship's expense, being brought along-side and taken from the ship's tackles at the charterer's risk and expense; all pilotage, port dues, and charges to be borne by the vessel; the captain to employ the charterer's stevedore, paying him at the rate of 12 cents per ton; and the vessel not to receive on board any merchandise unless by the order of the charterers, who had the option of reletting the vessel in whole or in part; the ship to sail whenever the charterers should so instruct the captain—the charterers agreeing to pay for

the hire of the vessel at the rate of £1 7s. 6d. per ton of 40 cubic feet measurement, on delivery of cargo according to the bills of lading, which were to be signed by the captain, as presented, at any rate of freight without prejudice to the charter-party; the captain to have absolute lien on the cargo for freight, dead freight, or demurrage.

The evidence showed that Hong Kong is seven days distant by steamer from Foochow; that the teas were transhipped "direct" at Hong Kong upon the T. A. Goddard, for which another bill of lading was given on December 28, 1877, by the master of the latter, reciting that the goods were "shipped in good order and well conditioned by Russell & Co. on board the T. A. Goddard, lying at Hong Kong, and bound for New York, deliverable there to the order of A. A. Low & Bros., or their assigns, on payment of freight at the rate of £1 15s. per ton of 40 feet." On this bill of lading were stated in the margin the same marks and numbers as in the previous bill, and the measurement was extended, showing "£117 0s. 7d., *through rate from Foochow.*"

The bark sailed from Hong Kong on January 3, 1878, and arrived at New York in April, when the teas, on unloading, were found to be impregnated with the odor of camphor. They were stowed in the after-part of the bark, between-decks, beneath the poop, which was built upon the upper deck, in which a quantity of camphor was stowed.

The claimants contended that it was customary and lawful for a general ship to carry camphor in the poop, although teas were aboard the ship, and that all diligence was used in tightly caulking the hatch from the poop below, and all other air openings, so as to prevent the possibility of any fumes from the camphor reaching and injuring the teas. They also gave evidence to show that Russell & Co. had requested the master to take the camphor aboard after the teas had been laden, and claimed that the injury to the teas could not have occurred on board the bark, and that if it did the vessel was not liable.

Benedict, Taft & Benedict, for libellants.

Owen & Gray, for claimants.

BROWN, D. J. From all the evidence in the case I am satisfied that the injury to the teas from the fumes of the camphor must have arisen on board the T. A. Goddard. They are proved to have been in good condition when shipped on board the Orestes at Foochow, and that vessel had no camphor aboard. The teas were transferred "direct" to the T. A. Goodard at Hong Kong, which took

a quantity of camphor aboard in the poop immediately over where the teas were stowed. The teas were unloaded on the day of the arrival of the bark at New York, or on the day following, and were then found to be so scented with camphor that the odor was perceptible as they were taken upon the truck along the street. Had this strong scent not been caused on board the bark, it must have been less perceptible on arrival here than when shipped at Hong Kong. At New York this odor was such as to constitute a manifest external condition; and if it existed when shipped at Hong Kong, it must have been as noticeable there as here, and in fact more so; and teas so scented were not "in good order and condition," within the terms of the bill of lading signed at Hong Kong by the master of the bark. These recitals in the bill of lading are *prima facie* evidence against the vessel as to all matters affecting the external condition of the cargo, (*The Ship Martha Olcott*, 140; *Clark v. Barnwell*, 12 How. 272, 283; *Bradstreet v. Heran*, 2 Blatchf. 116; *The Bark Olbers*, 3 Ben. 148;) and upon the bill of lading, therefore, as well as upon the proved absence of any other previous cause, the injury must be held to have occurred during the voyage from Hong Kong. See *The Lizzie W. Virden*, 12 Rep. 552; S. C. 11 FED. REP. 903.

The evidence produced by the claimants to show that it was customary, or not regarded as dangerous, to bring camphor in the same vessel with teas seems to me insufficient. On the contrary, several of the oldest merchants testified that it was not customary; that it was known to be dangerous; and some regarded it as a thing unheard of. The master testified that he had never brought camphor with tea before; that he hesitated about taking the camphor in the present case; that he made inquiries about it of other captains, and was told by some that it might be taken in the poop of a vessel like the T. A. Goddard, and that he thereupon took it aboard as requested by Russell & Co.

A general ship may carry such goods as are usually carried in the same cargo without liability, if due care is exercised in properly separating and stowing articles which might naturally injure each other. *Clark v. Barnwell*, 12 How. 272; *Baxter v. Leland*, 1 Blatchf. 526; *The Sabioncello*, 7 Ben. 360; *Lamb v. Parkman*, 1 Spr. 343. But where articles are received on board known to be dangerous to goods previously shipped, and not usually carried in the same cargo, the ship must be held to take them at her peril; nor does any reason appear in this case why the teas should not have been placed in a

part of the ship more remote from the camphor. The vessel should therefore be held liable, as well for negligence in receiving camphor aboard as for improper stowage, unless the libellants are precluded from recovery because bound, as is claimed, by the acts of Russell & Co., and by their consent to the receipt of the camphor on board.

The charter-party in this case constituted a contract of affreightment only, and not a demise of the vessel to the charterers for the voyage. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 49, 50; *Dona-hoe v. Kettell*, 1 Cliff. 135; *Richardson v. Winsor*, 3 Cliff. 395, 400; *Drinkwater v. The Spartan*, 1 Ware, 153, 156; *Leary v. U. S.* 14 Wall. 607; *Reed v. U. S.* 11 Wall. 600. The owners of the bark, retaining the possession and control of her, were, therefore, as carriers, responsible for her navigation, and for due care and diligence in the custody, stowage, and transportation of the goods, according to the terms of the charter-party and the usages of trade; and the vessel became liable *in rem* for any breach of those obligations. *The Gold Hunter*, Bl. & H. 300; *The Rebecca*, 1 Ware, 188; *The Phebe*, Id. 265; *The Paragon*, Id. 322; *Gracie v. Palmer*, 8 Wheat. 605, 633; *Freeman v. Buckingham*, 18 How. 182, 190; *N. J. St. Nav. Co. v. Merchants' Bank*, 6 How. 344, 381; *Propeller Niagara v. Cordes*, 21 How. 7, 22, 23; *Lamb v. Parkman*, 1 Spr. 343; *Maclac Shipp.* 115, 390.

It is contended on the part of the claimants, however, that the libellants are bound by the acts of Russell & Co., even subsequent to the shipment of the teas on board the T. A. Goddard, and that they are precluded from any recovery in this case because Russell & Co. requested the master of the T. A. Goddard to take the camphor on board, and that this estops the libellants from any claim for damages resulting therefrom, as much as if they themselves had requested it. (*Maclac Shipp.* 415;) that the bill of lading signed by the master of the T. A. Goddard describes Russell & Co. as the shippers of the teas at Hong Kong, and this is referred to as evidence that the bark dealt with Russell & Co. alone, and had no knowledge of any other persons being interested in the teas; and that, for the purposes of this shipment, Russell & Co., who had been entrusted with the goods at Foochow, must be deemed to be the agents of the owners in shipping them on board the T. A. Goddard, and authorized by them to permit the carriage of the camphor as part of the cargo.

The liability of a vessel *in rem* for want of due diligence in the care and custody of goods received on board for transportation is the same whether the owners of the ship remain in possession as carriers, or whether the terms of the charter-party are such as to constitute a

demise of the vessel for the voyage, so as to render the charterers the owners *pro hac vice*, and alone personally responsible for the transportation. If the charter-party had in this case, therefore, transferred the entire possession of the ship to Russell & Co., and the damage from camphor had arisen through their own sole act, the ship must have been held answerable to the libellants, (*Schooner Freeman v. Buckingham*, 18 How. 182, 189; *The Phebe*, 1 Ware, 263, 271; *Richardson v. Winsor*, 3 Cliff. 406,) and the owners of the bark must have looked to Russell & Co. for their indemnity. *Pierce v. Winsor*, 2 Cliff. 18; *Gillespy v. Thompson*, 2 Jur. (N. S.) 713; *Maclac. Shipp.* 445, 446. There would seem to be no reason, therefore, why the ship should be any the less liable where, as in this case, the damage arose through the concurrent acts of the charterers and the master, and where, by the terms of the charter-party, the owners remained in possession of the ship, and through their agent the master held control of her, and had the right to reject improper or dangerous goods, even though requested to take them by Russell & Co., but failed to do so. *Brass v. Maitland*, 6 El. & Bl. 470; *Pierce v. Winsor*, 2 Cliff. 18; *Abb. Shipp.* †402.

Aside from this consideration, however, the evidence fails to show that Russell & Co. were the general agents of the owners of the teas, or that they had any authority whatever, or any apparent authority, to dispense with the observance of any of the customary precautions for the safe carriage of the goods. Russell & Co. had signed a bill of lading upon the shipment of the teas at Foochow, and had thereby bound themselves individually for the entire transportation according to the terms of that bill of lading; first by the *Orestes* to Hong Kong, and thence by transshipment on board the T. A. Goddard for the rest of the voyage to New York. At the time of signing this bill of lading they held a charter-party which fully authorized them to make such contracts for transportation upon the T. A. Goddard. Under this charter-party they were expressly authorized "to relet the vessel in whole or in part." That authority to relet embraced by necessary implication an authority to bind the captain and owners of the bark, subject to the terms of the charter-party, to the performance of all the ordinary duties of carriers by water as regards any goods which Russell & Co. might procure to be shipped on board. A bill of lading is, in one respect, but a particular contract of affreightment for so much space in the vessel as the particular goods require. *Drinkwater v. The Spartan*, 1 Ware, 156. In procuring Purdon & Co., whom the libellants represent, to part with their goods

at Foochow and ship them on board the *Orestes* under the bill of lading there given to them and signed by Russell & Co. for the whole voyage to New York, the latter by that act relet and pledged to the libellants so much of the T. A. Goddard as was required for the carriage of their goods, with all the securities for safe carriage which the charter-party afforded. This was precisely such an act as the charter-party expressly authorized Russell & Co. to do. The bark was interested in and benefited by its performance through the freight to be earned thereby, on which she would acquire a lien as security for her own compensation. The libellants, or their representatives, in receiving the bill of lading signed by Russell & Co., and in parting with their goods and shipping them on board of the *Orestes* on the faith thereof, had a right to rely upon the performance of that which the bark had thus authorized Russell & Co. to pledge, viz., the transportation of the goods to New York upon the ordinary obligation of carriers by water, such as existed under the express terms of this charter-party. Its provisions from that moment enured to the benefit of the libellants, the goods being lawful and accustomed merchandise, such as the bark was bound to receive.

The charter-party, with its authority to Russell & Co. to relet, and the subsequent bill of lading signed by Russell & Co. pledging transportation upon the bark in accordance with the terms of the charter-party, made together a valid contract for the carriage of the teas, which neither Russell & Co. nor the bark could thereafter vary, and which, from the moment the goods were received on board of the bark with notice of the sub-contract, bound the bark, as well as her owners, to its performance. Thereafter the terms and obligations of the contract were unalterable, except with the consent of the shippers. Neither Russell & Co. nor the captain of the bark had any more authority to dispense with the usual precautions for the safe transportation of the teas, than they had to carry them on deck or to throw them overboard.

In the case of *Gracie v. Palmer*, 8 Wheat. 605, 639, it was held not to be within the power of the master and the charterers combined to make any arrangement with the shippers, who had means of knowledge of the charter, whereby the ship-owners would be deprived of their lien upon the goods for freight according to the terms of the charter-party, on the ground that the master had no authority to make any such changes in the terms of the owner's contract; and this was also approved in *Freeman v. Buckingham*, 18 How. 182, 192. See, also, *Pollard v. Vinton*, U. S. Sup. Ct. April, 1882, (13 Rep.

545; Mar. Reg. May 10, 1882.) The same principle applies conversely to the owners of the goods. Russell & Co., the charterers, had no authority to vary the contract which they had made with the shippers of the teas, and neither they nor the master, nor both combined, could, after the shipment of the goods on board the bark, with notice of the shippers' contract, vary the carrier's obligation, or deprive the shippers of their lien on the ship for safe and careful transportation.

The libellants, having no direct agreement with the master of the T. A. Goddard, are doubtless limited in their recovery by the lawful terms of the contract between Russell & Co. and the bark, as laid down in the case of the *N. J. St. Nav. Co. v. Merchants' Bank*, 6 How. 344. But this contract is to be found in the terms of the charter-party executed between Russell & Co. and the ship-owners prior to the shipment of the teas, in precise accordance with which the libellants' goods were shipped, first, on board of the *Orestes*, and thence by transshipment, on board of the bark, and not in any subsequent arrangements in violation of those agreements.

The rights of the libellants must be determined according to the terms of the contract between the bark and Russell & Co., as it existed at the time the libellants acted upon it by shipping their goods under the bill of lading given by Russell & Co., and not by any subsequent contract or parol requests at variance with the terms under which the goods had already been received on board of the T. A. Goddard.

The lading on board of the bark by transfer from the *Orestes* was, in legal effect, as much the act of the libellants, or their representatives, as if they had been shipped by them directly on board of the bark in the first instance; and Russell & Co. had no more authority, after the goods had been thus shipped, to dispense with precautions necessary to their safety than in the case of any other shipper.

The captain of the bark in this case had sufficient notice that these teas were not the goods of Russell & Co. and cannot claim exemption on the ground that he dealt with Russell & Co., as the owners of the goods, authorized at any time after the shipment to dispense with the usual conditions of liability. There was nothing in the situation, upon the transshipment of the teas from the one vessel to the other, from which the master of the bark had any right to assume that the teas were the property of Russell & Co., or that they had any authority to waive any necessary precautions to insure their safety. Russell & Co. had not been furnished by the shippers with any *indicia* of

ownership, or of the right of disposal of the teas. It does not appear by the evidence in what relation Russell & Co. stood to the Orestes; but if they had any possession or custody of the goods at all, it was at most only in the character of bailees for their transportation, precisely like that of the master of the Orestes while they were on board that vessel, viz., that of a carrier of merchandise, subject to and limited by the terms of the bill of lading which they had signed. But such possession by a carrier of goods is not even *prima facie* evidence of any ownership, or of any general authority over the goods, except such as is strictly incident to and limited by his duties as carrier; and third persons dealing with him in reference to the goods do so at their peril. *Saltus v. Everett*, 20 Wend. 267, 284; *The Idaho*, 93 U. S. 576, 583; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 329, 330; *Covill v. Hill*, 4 Den. 523; *Moore v. Met. Nat. Bank*, 55 N. Y. 41; *Gracie v. Palmer*, 8 Wheat. 639.

The captain of the bark knew that her carrying capacity was by the terms of the charter-party at the disposal of Russell & Co.; that they were expressly authorized to "relet the vessel in whole or in part;" that she had been advertised by them to the public as a general ship for the carriage of merchandise; and he knew, therefore, that other persons were interested in the character of the goods received aboard. The bill of lading of the Orestes, from which the teas were transhipped direct, must have been easily accessible to the master of the bark, and showed that Russell & Co. were not the owners of them; as, in the case of *Gracie v. Palmer*, *supra*, the terms of the charter-party were held accessible to the shippers. The bill of lading, signed by the master himself at Hong Kong, showed on its face that the teas had been brought from Foochow on *freight*; it recited the amount of this freight at a rate about 25 per cent. greater than the rate of the charter-party; and it expressly stated it to be "through rate from Foochow," *i. e.*, through to New York.

These facts would seem sufficient of themselves to apprise the captain of the bark that the teas could not have been the goods of Russell & Co. They were certainly sufficient to put him upon his guard, and upon inquiry, which would easily have led to knowledge of the facts; and I cannot doubt that the facts were fully known to him; for, though twice examined upon separate depositions, he does not in either deposition state that the teas were ever represented to him to be the teas of Russell & Co.; that he supposed they were their goods; or that, in subsequently receiving the camphor aboard, he relied upon their request as exempting the ship from liability. On

the contrary, the master did not accede to this request at once, but only after some delay, and after inquiry of other masters of vessels as to the danger of carrying camphor; so that he seems to have acted upon his own judgment, and upon his own sense of responsibility to the owners of the goods on board, whoever they might be, and not upon any supposed exemption from liability through the request of Russell & Co., or any belief that they were the owners of the teas.

If the bill of lading signed by the master of the bark at Hong Kong, describing Russell & Co. as shippers, and naming new consignees of the teas, were to be interpreted as a contract whereby the goods were designed to be shipped by Russell & Co., as absolute owners, to independent consignees, it would import a conversion of the goods by Russell & Co., since they had no authority from the owners, nor any semblance of any authority, for such an act; and as the master of the ship had sufficient means of knowledge as to the facts, this wrongful act of Russell & Co. would furnish no defence to the ship.

There is no reason, however, to place this interpretation upon the bill of lading taken in the name of Russell & Co. and signed by the master at Hong Kong, because the evidence shows there was no intention or understanding by either party looking to any diversion of the goods. The teas, on arrival at New York, were delivered according to the terms of the bill of lading given at Foochow, to the order of the consignees named therein, upon the payment of the freight, to the consignees of the ship; and the second bill of lading signed at Hong Kong, would seem, therefore, to have been designed only as a memorandum of the receipt of the teas on board, given to Russell & Co. as representatives of the real owners, and also as a means of transferring to the agents of the ship at New York the whole through freight from Foochow, on account of the freight due under the charter-party. The consignees named in it never pretended to any right in the teas beyond the amount of this through freight, and it was, doubtless, so understood by both.

While, therefore, the second bill of lading was irregular in form, it does not appear to have been designed, as it certainly was not used, to prejudice the rights of any of the parties. Nor was it essential to the rights of either. The rights of Russell & Co. were protected by the terms of the charter-party, and those of the libellants, by the first bill of lading signed by Russell & Co., which bound the bark from the time the teas were received aboard with notice of it. In signing bills of lading in such cases, the master, according to the late English authorities, acts as agent of the charterer; although the owners will

also be held liable where a shipper has dealt with the master in ignorance of the charter. *Marquand v. Banner*, 6 El. & Bl. 232; *Sandeman v. Scurr*, L. R. 2 Q. B. 86, 97; *Schuster v. McKeller*, 7 El. & Bl. 704, 723; *The St. Cloud*, 1 Brow. & Lush. 4, 15. See *Peek v. Larsen*, L. R. 12 Eq. Cas. 378. But in this country it has been repeatedly held that the obligations of a carrier by water to use due care and diligence in the stowage and transportation of the goods received on board exist independently of any bill of lading. *Brower v. The Water Witch*, 1 Black, 494, *Nelson, J.*; *Robinson v. Crittenden*, 69 N. Y. 525, 531; *The Casco*, 2 Ware, 184, 186; *The D. R. Martin*, 11 Blatchf. 235. And it is well settled also that a person whose goods are transported by contract with a charterer, in a chartered vessel navigated by her owners, as in this case, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners who have caused the loss. *N. J. St. Nav. Co. v. Merchants' Bank*, 6 How. 344, 380; *Freeman v. Buckingham*, *supra*; *Campbell v. Perkins*, 4 Seld. 430, 438; *The D. R. Martin*, *supra*.

The provision of the charter party that the captain should "employ the charterer's stevedore, paying him at the rate of 12 cents per ton," does not affect the liability of the ship or her owners for improper stowage, since the stevedore in such cases is held to be in the employ of the captain, and under his direction and control, as the representative of the owners, (*Richardson v. Winsor*, 3 Cliff. 405-7; *Sandeman v. Scurr*, L. R. 2 Q. B. 86, 98;) although it is otherwise where the stevedore acts under the direction of the shipper or owner of the goods. *The Diadem*, 4 Ben. 247; *The Miletus*, 5 Blatchf. 335; *Blaikie v. Stenbridge*, 6 Com. B. (N. S.) 894, 915. See the last case explained by *Clifford, J.*, in *Richardson v. Winsor*, 3 Cliff. 404. Except in the application of its special facts, *Blaikie v. Stenbridge* must be deemed overruled by the case of *Sandeman v. Scurr*, *supra*.

No sufficient grounds, therefore, appearing to exempt the ship from liability, the libellants are entitled to judgment, and to an order of reference to compute the damages, with costs.

ELEVEN HUNDRED TONS OF COAL.

(Circuit Court, D. Maine. June 5, 1882.)

1 CHARTER-PARTY—STIPULATION FOR LOADING.

Where the charterers had refused to give lay days, and had insisted upon the insertion of the clause "vessel to load in turn at Sydney according to the custom of the port, strikes and accidents of the mines excepted," and the charterers had written that vessels loading culm or slack coal were not to wait for vessels loading coarse coal, *held* that the stipulation means that the vessel was to take its turn with other vessels loading culm

2. SAME—DEMURRAGE—CUSTOMARY DISPATCH.

Customary dispatch, strikes, and accidents of the mines excepted, would permit the charterer of a ship, where coal is the only article of export, and is always loaded from the mine, to load with all due diligence, working the railroad to its full capacity.

3. SAME—DUE DILIGENCE.

Where the evidence showed that culm piled up near the mine and exposed to the weather is believed to be dangerous, the agents of the mine would not be justified in shipping it without the captain's consent, and it was no want of diligence not to load the earlier vessels with it.

4. SAME—ESTOPPEL.

A letter written by the charterer merely expressing an opinion that the detention will not be great, is not to be construed as a warranty or estoppel.

Libel for Demurrage.

F. P. Shepherd, the libellant, master of the barquentine John Baizley, chartered that vessel June 27, 1881, to D. W. Job & Co., of Boston, to bring a cargo of culm or coal from Sydney, Cape Breton, to Portland, Maine. The negotiation with the libellant was carried on through Chase, Leavitt & Co., ship-brokers, of Portland, who wrote to Job & Co. June 17, 1881, that they had not been able to induce the owners of vessels to accept orders for Sydney, adding: "We do not suppose you can give lay days at Sydney for loading; if so, we can get vessel without any doubt. They fear detention at Sydney." Job & Co. answered the next day, in a letter containing this sentence: "There would not be much detention at Sydney, as the vessels we want would load *slack* coal, and consequently would not have to wait for those taking *coarse* coal." This letter was shown to the libellant before he made the contract. The charter-party had the following clause: "It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge cargo. *Vessel to load in turn at Sydney, according to the custom of the port, strikes and accidents of the mines excepted, and discharge with dispatch at Portland.*

And for each and every day's detention, by default of said party of the second part, or agent, ——— dollars per day shall be paid," etc. The words in italics are in writing, the remainder in print. The usage in shipping coal at Sydney is that the miners bring it to the surface and dump it into cars. It passes over a screen, and the coarse or round coal goes into one set of cars and the culm or screenings into another set. The cars are then taken to the port, and the coarse coal is passed through spouts into vessels at one pier, and the culm into vessels at another. There was but one berth for each class. The usage of all the mines at Sydney is similar. There is no exporting business there, excepting from the coal mines. The International mine, in July, 1881, produced and shipped about 800 tons a day, of which about 150 tons was culm. They had a pile, or bank, of culm at the mine; but this culm is not usually taken for shipment, because it is thought to be more liable to spontaneous combustion than when freshly mined. The railroad was in good order, and the amount shipped was quite as much as usual. The libellant arrived at Sydney July 7, 1881, and reported to the agents of the International mine, in accordance with a direction from the charterers. At this time, three vessels were waiting to load with culm from the same mine. They were loaded in turn, at the rate of about 150 tons a day, ending July 24, 1881. Captain Shepherd hauled into the dock July 25th, and was cleared August 2d. The shipment was suspended for one day, July 27th, by a strike at the mine. On the twenty-first of July the libellant notified the agents that his lay days had expired, and that he should claim demurrage thereafter at the rate of \$88 per day. On the day of his clearance he notified them that he claimed demurrage for 10 days, at the rate of \$84.32 per day. When he arrived at Portland, August 12, 1881, he notified Job & Co. that he had been detained at Sydney by steamers and other vessels loading coarse coal, which arrived after him, and that he should not discharge his cargo until this demand, which he states at "about \$900," was satisfied. He libelled the coal for freight and demurrage, and a settlement of the freight was afterwards made. The district judge having been of counsel in the cause, it was certified to this court for trial.

T. H. Haskell and W. F. Lunt, for libellants.

C. T. Russell and C. T. Russell, Jr., for claimants.

LOWELL, C. J. This case, upon which others depend, is of much importance to the parties, and has been very thoroughly argued. The main question is, what is the meaning of the stipulation for

loading contained in the charter-party? The charterers had refused to give lay days, and had insisted upon the insertion of the clause "vessel to load in turn at Sydney, according to the custom of the port, strikes and accidents of the mines excepted." Considering that this is part of the agreement concerning lay days, and that the charterers had written that vessels loading culm, or slack coal, were not to wait for vessels loading coarse coal, I cannot doubt that they intended this language to mean that the vessel was to take its turn with other vessels loading culm. The captain, in his letter of August 12th, complains that vessels loading coarse coal, arriving after him, had been dispatched before him; but not only was this the custom, but it seems a reasonable one, because the same vessel never takes both kinds of coal, and therefore it would not hasten the loading of one class to stop loading the other; there being force enough to carry on both at the same time. I hold, therefore, that the turn in loading this cargo refers to vessels seeking a similar cargo.

The counsel for the libellant, at the argument, insisted that if the vessel was to take her turn for culm it was not supplied fast enough. They say that a merchant charterer is bound to have a cargo ready for shipment, and to put it on board in a reasonable time; and that the "custom" mentioned in the charter-party, means only such general usage of the port as refers to the mode of loading a cargo which is at hand. If the latter proposition is sound, no doubt the former is, and I should be bound to inquire whether the three vessels in port, and the libellant's vessel were all dispatched within a reasonable time.

It has been held that when a vessel is to load or discharge in a general port, like New York, Liverpool, or New Orleans, "customary dispatch," or a similar phrase, refers to the general customs of the port, and not to the special usage of the charterer in his business, or to his means of dispatching a ship. *Kearon v. Pearson*, 7 Hurls. & N. 386; *Adams v. Royal Mail Co.* 5 C. B. (N. S.) 492; *Lawson v. Burness*, 1 H. & C. 396; *Sixty Thousand Feet of Lumber*, 2 FED. REP. 396; *Lindsay v. Cusimano*, 10 FED. REP. 302. But there is no shipping business at Sydney, excepting in coal, and there are no usages to which the charter can refer, excepting those of the mines. This was frankly admitted in the argument, and, indeed, insisted on. The clause, then, refers to these usages or to nothing. I repeat, in this connection, that it is impossible to doubt that the charterers intended to refer to the usage which all the miners have, for some 40 years or more, adopted and adhered to. I see no reason for saying that the

intention is not well expressed. Nor do I know that the master of the John Baizley was ignorant of it. He has not said so. He knew that there was danger of detention, and that the charterers refused to take the risk of it. I suppose his freight, which was \$1.65 a ton, must have been based upon the chance of some delay, because it seems to have been the market rate; and it is probable that the ship-owners of Maine had a general knowledge of these usages, or, at any rate, of the delay resulting from their application, and adopted their rates of freight accordingly.

Customary dispatch, strikes, and accidents of the mines excepted, would therefore permit the charterer of a ship, where coal is the only article of export, and is always loaded from the mine, to load from his mine with all usual diligence, working the railroad to its full capacity, all of which was done in this case. Whether, if other mines at Sydney gave greater dispatch, this contract, referring generally to the usages of the mines, might not require the greatest dispatch given by any mine, I do not decide.

Judge Sprague held, in a somewhat similar case, that the shipper was bound to furnish the usual supply of coal, and charged him with so many days, and only so many, as were lost by his furnishing a less amount. *Nichols v. Tremlett*, 1 Sprague, 361. That is the case most like this which I find. The following have some analogy to it: *Harris v. Dreesman*, 23 L. J. Ex. 210; *Robertson v. Jackson*, 2 C. B. 412; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; L. R. 5 Q. B. 544.

In *Hudson v. Ede*, L. R. 2 Q. B. 566; L. R. 3 Q. B. 412, the charterer was bound to load in 30 days, detention by ice excepted, and a detention in the river Danube, many miles above the port, excused him, though the port itself was free; it being usual to rely on the river for transportation.

It was proved in *Nichols v. Tremlett* that the custom of the mine was to store coal in winter against the needs of shipment in summer. Here there is no such evidence, except that culm is piled up near the mine when there is no demand for it for immediate shipment. But the evidence is that this pile is not usually drawn on for shipment, because culm which has been exposed to weather is believed to be dangerous. The libellant demanded and received some of this culm; but he appears to have run some risk of setting his vessel on fire with it, or at least to have thought so. Upon the evidence, the agents of the mine would not have been justified in shipping this culm without the captain's consent; and therefore it was no want of diligence not to load the earlier vessels with it.

The letter which Job & Co. wrote, and which may have induced the libellant to enter into this engagement, was literally true in representing that vessels for culm do not wait for those which take coarse coal. It was wrong in its inference that there would be any advantage to the libellant from this state of things; because, as it happened, there were more vessels waiting for culm, in proportion to the supply, than were waiting for coarse coal. But as it would be difficult to say what is or is not "much detention," and as the letter appears to have been written in good faith, I cannot hold it to be a warranty or estoppel, but only what it appears on its face to be,—an expression of opinion that the detention will not be great.

Libel dismissed, with costs.

THE JAMES M. THOMPSON.

(District Court, S. D. New York. April 5, 1882.)

1. COLLISION—NARROW STREAMS—DILIGENCE TO AVOID DANGER—SIGNALS.

In navigating a narrow stream choked with vessels on either hand, active diligence to avoid collisions, and the use of all available means, including the giving of prompt signals in case of apprehended danger, are among the obvious and ordinary duties of navigation.

2. TUG AND TOW—ENTERING NARROW STREAMS—DUTIES OF.

Where the steam-tug S., with a tow lashed to her starboard side, entering Newtown creek upon the southerly side, was followed at a short distance by the steam-tug J. M. T., towing upon a hawser a light loaded scow of more than twice her breadth, and the S. having crossed the creek in front of the J. M. T., but not having room to come round against the flood tide for the purpose of landing her tow, came at rest in a position nearly directly across the creek and occupying nearly the full half of its width, and the J. M. T. passed within 10 or 12 feet of her stern, when the S.'s propeller was seen backing water, and the pilot of the J. M. T. then apprehended a collision with the scow if the S. did not stop backing, but gave no danger signals and kept on his course in order to pass through the draw-bridge just above, and then open, and there being no other reason for not slackening speed or stopping than the alleged fear of fouling the hawser or approaching other vessels, and a collision ensued between the scow and the S., *held*, that the J. M. T. was in fault for not sounding danger signals when the danger was perceived, and for not slackening speed or changing her course. *Held, also*, that the S., having the use of her motive power, was not entitled to the immunities of a vessel at anchor, though for the moment at rest, but was in fault for neither proceeding somewhat further ahead when occupying nearly half the stream, which it appeared she was able to do, or, if unable to do so, in not sounding danger signals to give notice to the other tug and scow of her inability to proceed. *Held, also*, that the scow was in fault, having a pilot of her own, with good steerage way, for

not porting her helm, though the danger was previously obvious, until within a few feet of the S., it appearing that by porting a little earlier the collision would have been avoided.

3. CONTRIBUTORY NEGLIGENCE—NO DEFENCE.

Though the collision might have been avoided by either of the other vessels, the negligence of either is no defence to either of the others in failing or neglecting to use the means at her own command to avoid it.

This was an action for damages to the tug-boat Skeer through a collision in Newtown creek in the afternoon of February 5, 1880, with the lighter Acme, then in tow of the tug James M. Thompson. The place of collision was at least 200 feet below the bend in the creek, and about 900 feet above its mouth. The creek at this point is shown by the chart and by the testimony to be at least 300 feet wide from bulk-head to bulk-head. It was lined by vessels lying abreast of each other on both sides, which diminished the space available for navigation from 35 to 60 feet on each side. The Skeer, 100 feet long, had entered the creek from the East river with a strong flood tide, and with the canal-barge Donnan lashed to her starboard side, and was about 300 feet in advance of the steam-tug James M. Thompson, which had the Acme in her tow upon a hawser 120 feet long. The Skeer, designing to land her tow upon the north side of the stream, had entered the creek close to the southerly shore, and shortly after she turned to cross the creek, designing to round to against the flood tide. In doing so she passed in front of the Thompson, but without interfering with the latter's course. The tow projected about 10 feet forward of the Skeer and when she had reached the northerly side of the creek she came to a stop, lying then about square across the river, and her tow being about eight or ten feet off from the boats moored at the bulk-head, and the stern of the tug being from 140 to 145 feet out in the stream from the northerly shore. The James M. Thompson was intending to pass with her tow through the southerly draw of the bridge, about 700 feet above the place of collision. She came up the center of the stream and blew one whistle as the Skeer crossed in front of her, continued on her course unchanged, and passed the Skeer at a distance variously estimated from eight to twenty feet. She was 17 feet wide. The Acme, her tow, was a scow 38 feet wide, light loaded, with square bows; and in attempting to pass the Skeer the port corner of her bows struck the port side of the Skeer upon the round of her stern from three to five feet only from her stern post. The tide at the time was running up at the rate of from two to three knots, setting

towards the northerly shore till beyond the bend, where it is deflected towards the southerly shore. The Thompson was under a slow bell, going at the rate of four or five miles per hour, or about two to three knots faster than the tide. On the part of the respondents it was claimed that the collision arose through the backing of the Skeer after the Thompson had passed her. The libellant denies that she backed at all.

E. D. McCarthy, for libellant.

Thos. C. Campbell, for tug James M. Thompson.

Scudder & Carter and Geo. A. Black, for scow Acme.

BROWN, D. J. In navigating a narrow stream, choked with vessels on either hand, active diligence to avoid collisions and the use of all available means, including the giving of prompt signals in case of any apprehended danger, are among the obvious and ordinary duties of navigation. *The Scots Greys*, 5 FED. REP. 369; *The Jessie Russell*, Id. 639; *N. Y. etc. Steamship Co. v. Calderwood*, 19 How. 241, 246. When such accidents occur in broad daylight, it is usually through the neglect of these duties by both parties, as I think is plainly shown in this case.

1. I am not entirely satisfied that the James M. Thompson was not in fault for taking her tow into unnecessary proximity to the stern of the Skeer. The latter had crossed the stream intending to round to against the tide in the usual manner, and became nearly or quite at rest, with the bows of her tow within eight or ten feet of the boats beside which she designed to moor. This was in full view of the Thompson, which came up from behind, and the intention of the Skeer to dock her tow was sufficiently apparent. Her stern lay about 145 feet out into the stream, within a few feet of the middle. There was at least 100 feet between her and the outside of the boats moored upon the opposite shore, leaving "ample room," as the answers admit, for the Thompson to pass the Skeer. Yet the Thompson passed, as I find from the evidence, only from 10 to 12 feet astern of the Skeer; and this course, even without taking into account any influence of the tide in setting her shorewards, was enough to draw the Acme, which was 21 feet wider than the Thompson, directly against, or very near, the stern of the Skeer, unless the Thompson was pulling towards the southerly shore. The pilot of the Thompson testified that he was so heading, and as much to the southward as he could and avoid some vessels moored at the bulk-head; but this is not consistent with the testimony of Callahan, a disinterested witness upon the bridge, who says she was heading directly up the middle of the

stream; nor is it apparently consistent with the previous testimony of the pilot, wherein he said that he did not change his course at all when the Skeer crossed the stream ahead of him. But, aside from this point, the pilot testifies that he saw the wheel of the Skeer commence backing water as soon as he had passed her, and that he then thought there would be a collision unless the Skeer stopped backing water; nevertheless, he gave no signal of danger, though he had gone so near the Skeer himself and was drawing a tow 21 feet wider, because, as he says, he "thought the pilot of the Skeer would see the tow and keep out of the way." Whether the Skeer actually made any stern-way or not is a question not free from doubt. Callahan, a disinterested witness, called for the defence, observing from the bridge, and who thinks the Skeer made some stern-way, testifies that if she had remained still it would have been "a close shave" for the Acme to pass by.

But a steam-vessel has no right unnecessarily to make "a close shave" upon another. The Revised Statutes of this state, (1 Rev. St. p. *684, § 7,) in providing that "whenever any steam-boat shall be going in the same direction with another steam-boat ahead of it, it shall not be lawful to navigate the first-mentioned boat so as to approach or pass the other boat, so being ahead, within a distance of 20 yards," though laying down a rule which cannot be literally applied in a narrow creek like this, is nevertheless based upon and recognizes a general obligation to keep at a reasonable distance, according as circumstances shall permit. It was therefore the manifest duty of the pilot of the Thompson, when he saw that the Skeer with her tow was quite near to the boats at the bulk-head, and was evidently engaged in docking her tow, and when, as he testifies, he feared there might be a collision unless she stopped backing, to stop himself, unless it was clear the Acme could pass, and to sound danger signals, so as to give notice both to the Skeer and to the Acme that they might govern themselves accordingly. Had such signals been given, there is no reason to suppose the Skeer would not have stopped backing, if in fact she had any stern-way, nor that the Acme would not have ported her helm much sooner than she did, which would doubtless have been sufficient to avoid the collision; nor does any reason appear why the Thompson could not have stopped her engines until the Skeer was passed by the Acme. The excuses given are plainly insufficient. There was no more danger to the tow or to the Thompson in stopping before the collision than in stopping after it, as they did, when neither of them sustained

any injury by so doing. There can be no doubt that by slackening speed and signaling, the Thompson would have avoided the accident, and nothing prevented her doing so. Unless, therefore, the pilot of the Thompson, seeing the danger which he confesses he apprehended, can be absolved from all obligation to do anything to avoid a threatened collision, the tug must be held in fault. He was bound to use all available means to avoid accident; and the Thompson must therefore be held in fault, if not for going too near the Skeer, at least for doing nothing to avoid the collision when the danger was perceived, either by signaling or changing her course or stopping her engines; all of which she might easily have done.

2. The Acme would not be held in fault if it did not clearly appear that her pilot was also negligent in the use of the means at his command to avoid the collision. She was light loaded, easily steered, and had good steerage headway, according to his own testimony. She was upon a course which, by all the testimony, must have drawn her port side very close to the Skeer, and the tide also was setting her towards the latter. Her pilot also claims that he saw the Skeer backing, which would bring her still more in his way; yet he made no shout, and made no attempt to change his course, according to his own testimony, until within 10 feet of the Skeer. He claims that this change carried the Acme somewhat to starboard. All the other witnesses testify that he continued on a straight hawser, on a line with the Thompson, without change; while the pilot admits that the Acme could have sheered at least 20 feet by porting, and that she answered her helm quickly; though he says that he had not sufficient room to starboard for doing so; but the other evidence shows that there was abundant room for that purpose.

The place of the blow upon the stern of the Skeer shows that by going a very few feet further to starboard the Acme would have cleared her, and this she could very easily have done by steering so as to avoid her. The same rule, therefore, which requires every vessel to use whatever means are in her power to avoid a collision, requires the Acme to be held answerable for this neglect.

Though it was thus within the power of the Acme to avoid this collision, the Thompson cannot be held on that account discharged, any more than the Acme can be held exempt, because the Thompson might have avoided it by going further off, or backing or stopping. Neither is exempted by the remissness of the other.

3. The Skeer must also be held in fault, whether she was actually backing her engines so as to acquire stern-way or not. The weight of evidence is undoubtedly to the effect that her engines were backing. The greater number of witnesses assert also that she had acquired some stern-way; but, if she had any, it must have been very slight. The pilot of the Thompson is not sure that she had any. His deck hand, who was watching, thinks she may have made five feet stern-way up to the time of the blow. All the other witnesses agree that she did not commence backing till shortly after the Thompson had passed her. The Acme, upon a hawser of 20 fathoms, would be but little over 100 feet astern; and, as she was moving through the water at the rate of at least a couple of knots, she must have reached the Acme about half a minute after the Thompson had passed. Evidence was given that no stern-way could be acquired by the Skeer with such a tow as she then had in less than from 35 to 45 seconds; and the testimony of the engineer of the Thompson rather supports this estimate.

I should not feel warranted, therefore, in holding the Skeer liable upon the ground that she backed into the Acme, as claimed, as that is at least doubtful upon the whole testimony; but she must be held chargeable with negligence in doing nothing to avoid an impending collision when the danger of it was obvious, if any proper lookout was kept, and when she was occupying so much of a narrow stream. *The Baltic*, 2 Ben. 452, 455. She was looking, doubtless, towards landing her tow; but she cannot on that account be excused from observing what was going on about her. Her stern lay within a few feet of the middle of a narrow creek. The scow behind was high out of the water, and upon a course which, whether the Skeer was still or backing, was alike dangerous. The Skeer was not in the situation, nor entitled to the immunities, of a vessel at anchor. She had the full use of her motive power; her engines were in motion; and she must, therefore, be held to the same rules of diligence that apply to other vessels passing each other or having command of their own movements.

From the narrowness of the stream and her inability to come round, lying almost directly across the creek and occupying very nearly the full half of it, if the Skeer was unable to proceed further in shore, or to fasten her bows at once so as to allow her stern to swing further to shore, one or the other of which it would naturally be expected she would do, it was her obvious duty to give danger signals like-

wise, and I doubt not she would have done so had any attention been paid to the scow. *O'Neil v. Sears*, 2 Spr. 52; *The Petrel*, 6 McLean, 491; *The Lady Franklin*, 2 Low. 220. No explanation is given of the alleged backward motion of her engines, because this backing is denied. Nor does any reason appear why she did not move somewhat further in shore, as she might and naturally would have done if the danger was noticed, having at least 10 feet space to do so. Had she observed the course of the *Acme*, as she was bound to do, and given signals of warning, as she also should have done if she could not get further out of the way, or was not intending to proceed to the dock, as it was supposed she would do, it must be presumed that the other vessels, one or both of them, would have understood that she could not do anything more to get out of the way, and would have been more diligent in using their own means of avoiding her. Instead of doing so, she appears to have attended solely to her own maneuvers, and either failed to observe the *Acme* at all, or relied exclusively on the other tug and tow to keep out of the way, precisely as the *Thompson* relied on the *Skeer* to keep out of their way. The rule which requires all parties to use with diligence all the means at their command to avoid accidents, thus applies, though in different ways, to all the three vessels.

The libellant is therefore entitled to judgment for half his damages and costs.

THE EXCELSIOR.

(*District Court, S. D. New York. April 25, 1882.*)

1. COLLISION—INSUFFICIENT LOOKOUT.

A schooner sailing in the Hudson river at night with a free wind, with no other lookout than the captain remaining abaft of the wheel, *held*, no proper and sufficient lookout.

2. SAME—STEAMER WITH TOW—HEAD ON—FAILURE TO EXHIBIT TORCH-LIGHT.

A schooner approaching a steam-tug with a tow nearly head on, must be held in fault in not exhibiting a torch-light, according to section 4234 of the Revised Statutes, unless it be clear that exhibiting a torch-light would convey no additional information as to her course and position, which cannot be assumed where, as in this case, there is reason to believe that the schooner's red light was obscured by her jibs.

3. SAME—CONFLICTING TESTIMONY—IMPROBABILITIES.

Where there is irreconcilable conflict of testimony as to the positions and courses of two colliding vessels, the account given from the vessel having no lookout properly stationed, being in part improbable in itself, is discredited.

4. SAME—FAULT BY CHANGE OF COURSE.

Where orders are given for a change of course by a schooner just prior to a collision, in the excitement occasioned by the sudden discovery of a steamer near at hand, from the want of a previous proper lookout, and the change of course contributes to the collision, the schooner must be *held* in fault.

5. SAME—NOTICE OF EXCEPTIONAL MOVEMENTS.

Where the steam-tug A., with the barge E. in tow upon a hawser, was proceeding up the Hudson river, and saw the schooner's green light about a point on her starboard bow, which, instead of broadening further to starboard as they approached, constantly made up more towards the stem of the steam-tug, that is, to windward, but no red light was seen, *held*, sufficient notice to the steam-tug of something exceptional about the schooner's course or lights, with the probability that she was constantly yawing to windward and was nearly head on, with her red light either extinguished or obscured, and that the steam-tug was bound to give her, therefore, a wide berth. The steam-tug, instead of doing so, having kept on her course unchanged, nearly head on, until, when the green light was a little off the starboard bow, the schooner ported and ran across the steamer's course, resulting in a collision with the barge, from which the schooner was sunk, *held*, that the steam-tug was liable for not keeping further out of the way, and that the damages should be apportioned.

6. OBSCURATION OF LIGHTS.

The captain of the barge, though having some steerage way, is not primarily answerable for her navigation, and not held with the same strictness to keeping watch of lights ahead; and not knowing on which side of the steam-tug the schooner, whose lights he had seen ahead, would pass, *held*, that he was not answerable for negligence in not noticing the schooner's lights for two or three seconds as she passed to port, and before they were enveloped and obscured by a cloud of steam, and not liable for not at that time immediately porting his helm.

Benedict, Taft & Benedict and *S. H. Valentine*, for libellants.

James McKeen, for steam-tug Atlas.

Butler, Stillman & Hubbard and *W. Mynderse*, for barge Excelsior.

BROWN, D. J. This is an action for damages for the loss of the schooner Warren Gates through a collision with the steam-tug Atlas and barge Excelsior, about 11 o'clock on the night of September 26, 1878, on the Hudson river, at a point about two miles north of Yonkers, whereby the schooner was immediately sunk.

The Warren Gates was a small schooner of about 73 tons measurement, 68 feet in length, and 24 feet beam. She was deeply laden with a cargo of about 425 tons of coal, having 25 tons on deck, on a voyage from Rondout, New York, to Niantic, Connecticut. She was coming down about the middle of the river, the wind a strong breeze from N. N. W., on her starboard quarter, with foresail and mainsail well out, both jibs set, and making from six to seven miles an hour. The tide was the last of the flood.

The Atlas, a steam-tug of 68 feet in length and 17 feet beam, was going up about the middle of the river, with the barge Excelsior in tow,

on a hawser 55 fathoms in length. The barge was 143 feet long by 23 feet wide, and was about half loaded, drawing four feet of water. All the vessels had the regulation lights properly set and burning. The tug passed the schooner to the right, but, as the libellants claim, struck her a somewhat severe glancing blow upon the port bow of the schooner, though this is denied by those on board the tug. The main-boom of the schooner, about 50 feet long, raked across the tug, carried away the top of her pilot house, broke the steam-whistle, bent the smoke-stack, and, it is said, became somewhat entangled in her upper works. She soon cleared, however, and shortly after the barge struck the port bow of the schooner nearly head on, in consequence of which the schooner sank in about three minutes. Her captain was carried down with her, but was rescued by the tug. The cook was drowned. The mate and one seaman, who were the only other persons on board the schooner, were afterwards rescued by another vessel.

The night was dark but clear. Each claims to have seen the lights of the other from one and a half to two miles distant. Shortly before the collision the wheel of the schooner was put first nearly to starboard, and then hard a-port, when, as alleged in the libel, a collision seemed unavoidable from a sudden change of course in the steam-tug; and there is no doubt that as the tug passed her the schooner bore somewhat to westward; for, when raised a few days afterwards, she was found heading one or two points to the west of the line of the river. But, as to all the time prior to this change of the schooner's wheel, the testimony of the parties, both as to the situation of the two vessels and their respective courses, is in irreconcilable conflict.

Upon the schooner the mate was at the wheel, and there was no other lookout than the captain, who had charge of the navigation. He remained abaft the wheel, claiming that on account of the spray from the bows it was a better situation for a lookout that night. He testified that he first saw the vertical white lights of the Atlas when two miles off, as he stood by the rail on the starboard quarter, and that these white lights were then seen between the two masts beneath the fore boom on his port side. Shortly after, he says, he went to the rail on the port quarter, and presently saw the red light of the Atlas about on a line with the port rail of the schooner; that it was three or four minutes after having seen the white lights that he first saw the red light of the Atlas about a point on his port bow, and that he kept watching it from that time on; that a short time after—two minutes, more or less—he saw the green light still on his port

bow; that he then apprehended a collision, and ordered the wheel put hard a-starboard, but that before there was time to starboard the wheel the steamer's red light came again suddenly in view, when he ordered hard a-port, and took hold of the wheel to help, and that he had hardly time to give the order hard a-port before the collision. On his cross-examination he says that he first saw the colored light when he was standing on the lee side, and saw the red light parallel with the lee rail, and that when he saw the green light he was in the same place, and saw it in the same direction; that up to the time of seeing the green light his course was not changed, but that they came down the middle of the river as straight as the schooner could be steered.

The mate, who was at the wheel, testified that he first saw the white lights on his port bow twelve or fifteen minutes before the collision; that three or four minutes afterwards he saw the steamer's red light about one point off his port bow, which remained in sight may be seven or eight minutes; that up to that time he had made no change at all in the course of the vessel, but sailed straight down the middle of the river; that she would yaw about three-quarters of a point upon either side; that he next saw the green light when three or four lengths of the schooner (about 250 feet) distant from the steamer, and that this green light bore a little on his port bow, when he got the order hard a-starboard, and before it was hard up he got the order, "The red light in sight again; hard a-port;" that he saw the red light himself the second time; that there was no interval to speak of between the order to starboard and the order hard a-port, and between the order hard a-port and the collision was a very short time—about half a minute, or a minute at the most.

The seaman who was below, off duty, was attracted on deck by hearing the captain sing out, "A light on the lee bow." He threw away his pipe, came on deck and went forward, and says he saw the red light from a point to a point and a quarter on the lee (port) bow; that it remained in view about five minutes; that he then saw both lights, and in two or three seconds saw the green light, when the tug was about five lengths of the schooner away (350 feet) and pretty near ahead; that he next saw the tug's red light; that the collision was so soon after that he had to "fly out of the bows;" that the tug hit the schooner on the port bow, a pretty heavy glancing blow, and that the barge struck less than half a minute afterwards, square on.

From all the surviving witnesses of the schooner, therefore, the testimony is uniform that the lights of the tug and tow were at all

times upon the schooner's port bow, and that the tug's red light, and not her green light, was visible until within three or four lengths of the schooner, when, by a sudden change, the steamer's green light was seen, threatening an immediate collision, when the schooner's helm was changed as a maneuver *in extremis* to ease the blow.

The testimony of the pilot and captain of the steamer is directly to the contrary. The pilot testifies that he first saw the lights of the schooner about two miles off, a little on his starboard bow, but could not at first make out which lights they were; that her course was zigzag till about one mile distant, when she showed a green light only on his starboard bow; that she kept on that course till her green light was about two points off on his starboard bow, when he could see her sails plainly at a distance of 400 or 500 feet, more or less, when she changed her course, shutting in her green light and showing her red light only; that at that time the schooner was so far upon his starboard bow that he could see the easterly shore of the river abaft the schooner; that if she had not changed the steamer would have passed some 500 feet to the west of her, and that upon her porting her helm he put his own helm hard a-port to avoid her; that the hull of the tug did not strike the schooner, and that he dropped down as the main boom raked over the tug, and on getting up found her headed right on to the easterly shore; that prior to porting his helm he was heading about one point to the westward of the line of the river; that he did not previously change his course at all after first making the schooner's lights, and that he was three-quarters over towards the easterly shore; that there was no other person on deck excepting the captain, who was lying down in the pilot-house when the lights were first seen, and got up almost immediately thereafter; and that the pilot-house was 15 feet from the stem of the tug.

The captain testified that the tug was going up the middle of the river, as near one side as the other, and heading straight up the river; that he first saw the schooner's green light, from one to one and a half points off his starboard bow, three-quarters of a mile away; that the green light remained in view about three or four minutes, when it was shut off and the red light became visible when about 300 feet off from the tug; that had the schooner kept on without this change she would have passed 100 feet clear to starboard; that at the time of this change he could hardly see the hull of the schooner, but could see her sails; that the tug's helm was immediately put hard a-port, and that the hull of the tug did not strike the schooner. On

his cross-examination he repeatedly stated that the green light, after being first seen on the starboard bow, did not broaden off more to starboard, but approached the stem; and that the red light, when first seen, was nearer the stem on the starboard bow than the green light when first seen. On the redirect he stated that the schooner "seemed to be coming for us all the time;" but he afterwards said that the green light, after being first seen, did broaden off on the starboard bow, and that no flash-light was shown by the schooner.

Both the captain and the mate testified that the captain of the schooner, when he got aboard the tug, stated to them that he ordered his wheelsman to put the wheel to starboard, but that the mate, instead, put it the wrong way, hard a-port. This was denied by the captain of the schooner.

The tug and tow were going with the tide at the rate of about seven knots, and the schooner at about an equal speed, so that they were approaching each other at the rate of about 14 miles per hour, or a mile in a little over four minutes, or about 1,250 feet per minute, and 20 feet per second.

It is impossible that these two accounts of the positions and courses of the respective vessels can both be correct. If the schooner's green light was seen, as stated, upon the steamer's starboard bow only, up to within a minute of the collision, it is impossible that the steamer's red light should have been seen at all, up to that time, by those on board the schooner, much less upon the schooner's port bow, as sworn to by those on board the schooner. Neither vessel had any proper lookout, properly stationed. That a master in charge of the navigation, standing abaft of the wheel, is not a proper lookout, has been often adjudged. *St. John v. Paine*, 10 How. 585; *The Ottawa*, 3 Wall. 268; *The Nabob*, 1 Brown, Adm. 115; *The Genessee Chief*, 12 How. 462-3. Testimony to that effect was given upon the trial; and the statement of the captain, that the spray thrown up by the vessel forward rendered the after-part of the vessel a better place for observation, cannot be accepted. The seaman who came up and went forward just before the collision, in my judgment did not come on deck at the time he said he did, some five minutes before the collision, but, as the master testified, only shortly before, when the shouts caused by the impending danger attracted his attention. He came up, not on duty, but for his own safety, and too late to be of any service in the navigation of the schooner. So the steamer, likewise, had only the pilot and the captain in the pilot-house, and these have been repeatedly held not to constitute a proper lookout.

The Nabob, 1 Brown, Adm. 115, 124; *The Ottawa*, 3 Wall. 268; *The Catharine*, 17 How. 177.

The want of a proper lookout, it is true, is immaterial, if it in no way contributed to the accident, (*The Farragut*, 10 Wall. 334; *The Fannie*, 11 Wall. 238, 243;) but the question here is whether the lights visible from the one vessel to the other were in fact correctly seen and noted; and whether the witnesses, in the accounts they give, did see what they now profess to have seen. The presence or absence of a proper lookout, and the position of the witnesses, and the probabilities of correct observation, are of the greatest importance, where the accounts given are irreconcilable.

The position of the captain and pilot in the pilot-house of the steamer, within 15 or 20 feet of her bows, would be for the most part as favorable for observation as the position of a lookout proper upon the deck forward; and yet it is not impossible that the red light of the schooner, if hidden by her jibs from the pilot-house, might at some moments have been visible from the deck. But the position of the captain of the schooner abaft of the wheel cannot be admitted for a moment as a proper position for a lookout, when sailing full and free with a strong wind, and in case of a conflict of testimony observation reported from such a position must be deemed partial, interrupted, and incomplete, and entitled to far less weight than that of a lookout properly stationed. The changes of the lights of the steamer, as he testifies they were seen from the schooner just before the collision, could not, in my judgment, have been caused, as he alleges, from any corresponding changes in the course of the steamer during the very short period of time in which they are said to have occurred. He says the steamer changed from red to green, and back again from green to red, followed immediately by the collision, and all so quick that the two orders, first to starboard his wheel and then hard a-port, could not be fully executed in the interval of these changes. It is impossible that the steamer, encumbered by a tow, could have swung first one way and then the other, so much as to change these lights in so short a space of time. The changes are wholly denied by the captain and by the pilot of the steamer, who say that the only change they made was that of a port wheel after the schooner's last change, viz., putting her wheel hard a-port, and any such repeated changes by the steamer as alleged by the captain of the schooner are in themselves highly improbable. *The Wenona*, 8 Blatchf. 499, 504.

The testimony of Lutz, the seaman, relied on to confirm that of the master, I do not accept, because I think he came up on deck and went forward at the time of the excitement occasioned by the apprehension of an immediate collision. The libellants' account, therefore, of what preceded and led to the collision, cannot, in my judgment, be relied on.

The testimony and circumstances, taken all together, lead to the conclusion that the vessels were approaching each other, from the first, nearly head on; that the schooner was a little to the eastward of the steamer in the river, upon a general course directed nearly straight downward, but yawing considerably on each side, but more to windward, and thus making up continually towards the stem of the steamer, as the captain of the latter testified; and that the steamer was heading very nearly directly up the river. This is confirmed by the testimony of the captain of the barge, who testifies that he saw both lights of the schooner directly ahead, half a mile distant, and that she came down so nearly head on that he could not tell on which side of the steamer she would pass. The captain and the pilot of the steamer do not admit seeing the two lights of the schooner at that distance, but only the green light, and it is suggested that the red light was obscured by the schooner's jibs. The two lights of the steamer should at the same time have been visible upon the schooner, and, in my judgment, would have been seen by a lookout upon her bow. It is quite likely that the captain, as he testifies, saw, while standing by his starboard-quarter rail, the steamer's vertical white lights a good deal upon his port side, when the schooner was yawing extremely to windward; and that, on account of the distance of the light to port, he did not keep any subsequent watch upon it; that the steamer's lights were more or less obscured by the schooner's sails, and that it was not until they were close upon her that either the steamer's red or green light was seen; that the sudden and unexpected appearance of these lights in succession—first the red and then the green light—led to the shouts of hurried and confused orders, startled the seaman off duty below and brought him on deck, and that the apparent changes of the steamer's lights were only such as he successively saw in the moments of excitement, which did not permit of his ascertaining the true course and bearing of the steamer, and led to a hasty and improper change of course.

The testimony of the captain and mate of the steamer can be sufficiently relied on, I think, to show that the schooner was some-

what upon the tug's starboard bow, so that it is impossible to say that the schooner's change of course did not contribute to the collision. If any change of course by the schooner was justifiable, it was only by starboarding the wheel, and not by porting.

The failure of the schooner to show a torch-light, as required by section 4234 of the Revised Statutes, must also be held to be a fault in this case which contributed to the collision. There is no reason to doubt the testimony of the captain and pilot of the steamer that they saw the schooner's green light for a considerable time before the collision. Their failure to see the red light also, which was seen by the captain of the tow and which must have come into view more or less, can only be accounted for by gross neglect in observation, or else by the red light being for the most part obscured by the schooner's jibs. The relative situation and courses of the vessels were such that such obscuration is quite possible. Had the captain of the schooner, or any proper lookout, been forward and seen the situation of the steamer, he would have known that this was possible, and would have been bound to take precautions against it. *The Wenona*, 8 Blatchf. 499, 512; *The Vesper*, 9 FED. REP. 569, 574. The exhibition of a torch-light in such a case would have put the steamer upon her guard, and repaired in a measure the misleading effect of the obscuration of the red light. The case is therefore within the decisions in the case of *The Eleanor*, 17 Blatchf. 88, 101-2, and in *Crawford v. The Niagara*, 6 FED. REP. 910; since it is impossible for the court to say that the exhibition of a torch-light would not have conveyed additional information to the steamer for avoiding the collision, (*The Alabama*, 10 FED. REP. 394;) and it is only where it clearly appears that the exhibition of a torch-light could not have served any useful purpose, or given any additional information as to the position or course of a sailing-vessel, that the omission to comply with section 4234 can be held to be immaterial. *Schooner Margaret*, 3 FED. REP. 870; *The Leopard*, 2 Low. 241; *Kennedy v. The Sarmatian*, 2 FED. REP. 911; *Waring v. Clarke*, 5 How. 441, 465.

The schooner was therefore in fault for not keeping a proper lookout, and for failure to exhibit a torch-light; and her change of course was in the wrong direction and contributed to the collision.

I think it must also be held that the tug was in fault in not having a proper lookout, and in not taking any steps seasonably to keep out of the way of the schooner. The testimony of the pilot, that the schooner was so far to the eastward that the tug without change of

course would have passed 500 feet clear of her, is not, I think, to be relied on. His account of the situation differs materially from that given by the captain, and both differ from that given by the captain of the tow. The local rules required the steamer to be upon the easterly side of the river. The pilot says she was three-fourths over, while all the other witnesses say she was in the middle of the river. The pilot says that the green light of the schooner was broadening off on his starboard bow as she approached. The captain, on his direct examination, said that the red light, when it first appeared, bore one-half a point on his starboard-bow, and was about 300 feet off; and on his cross-examination he said repeatedly that the green light was continually approaching the stem, instead of broadening off, from the time when he first saw it, three-quarters of a mile distant, till the red light appeared, and that the schooner "seemed to be making for us all the time;" and he estimated, on direct examination, that he would have cleared the schooner, if she had not ported, by 300 feet, but on cross-examination put it at 100 feet only, instead of 400 or 500, as testified by the pilot; while the captain of the tow, who saw both her lights, says she came so near head on that he could not tell on which side she would pass. The pilot says he was not watching her lights all the time; and had the schooner been so far to the eastward as the pilot testifies when she first showed her red light, *i. e.*, so as to pass from 400 to 500 feet clear, and being at that time only 300 feet off, it is incredible, no matter how suddenly the captain of the schooner may have been surprised on first seeing the steamer's colored lights, that he should have ported and ran far out of his course across the steamer's bows; nor, in that situation, could the steamer's colored lights have failed to have been seen much earlier. *Haney v. The Baltimore, etc.*, 23 How. 291; *The Carroll*, 1 Ben. 290. Just how soon the captain of the steamer got up to observe the lights is an open question. He says he first saw the green light three-quarters of a mile off, one to one and a half points on his starboard bow; that this light drew up to within half a point of his stem. When 300 feet distant the green-light was shut in and the red light came suddenly in view; yet, though the schooner was so near, and coming so nearly directly upon her, the steamer took no steps whatever to keep out of the way. Whether, therefore, regard be had to the testimony of the captain of the tow, who saw both lights, or to that of the captain of the steamer, who says he saw only the green one, and that one continually drawing nearer to the stem of the steamer, I think it clear

that he took no such seasonable precautions to avoid the schooner as is incumbent upon a steamer, even with a tow. *The Favorite*, 9 Fed. Rep. 709; *The Nabob*, 1 Brown, Adm. 115.

Where there is plenty of sea-room, a steamer encumbered by a tow is for that very reason bound to take early precautions to give a sailing-vessel ample margin for passing.

The evidence in this case shows that for a considerable period before the collision the vessels continued to approach each other nearly head on, at the rapid rate of nearly 14 miles per hour; yet the steamer made no change in her course till after the schooner's red light appeared, some 10 to 15 seconds only before the collision; while if both the schooner's lights were not seen, but only the green light, in consequence of the red light being obscured by the jib, nevertheless, the failure of the schooner to haul more to starboard under the green light exhibited, as would naturally have been expected, and the fact that she drew up continually in the opposite direction, which I think is proved, notwithstanding the captain's final modification of his testimony, was sufficient to apprise the captain of the steamer of some exceptional circumstances in the situation which required him to keep well off, and also to sound signals of alarm, neither of which was done. His final change of helm, just before the collision, was sufficient probably to avoid much injury to the schooner by the steamer itself, but ineffectual to save the tow from colliding with and sinking her.

As respects the barge it is claimed by the libellants that she might easily have avoided the collision by porting her helm; and that, being some 50 fathoms astern of the steamer, had she done so the collision between the tug and the schooner must have been avoided. All the witnesses, however, agree that the steamer's whistle was broken off as she was raked by the boom of the schooner, and that the immediate escape of steam was so great as completely to obstruct further observation. The captain of the tow testifies that as soon as he saw the schooner coming down on the port side he immediately ported his helm, and did what he could to avoid her, and that he did not previously know on which side of the steamer she would pass. It would seem that there must have been two or three seconds—evidently not more than that, considering the combined speed of both vessels—when, if he had been on the strict watch, he might have seen the light of the schooner as she passed to the port side of the steamer before the escape of steam had obstructed the view; but as the captain of the tow was not primarily responsible for the navigation, nor

bound to keep a strict and constant lookout for vessels ahead, I think he is not chargeable legally with knowledge, against his own testimony, for what he might have seen during the short space of two or three seconds; and that his failure to notice this momentary appearance of the schooner's light on the port side before it was obscured by the escape of steam, which might, if it had been seen, have led him to port his helm sooner, is not legally chargeable against him as negligence; and there being no other fault chargeable against him upon the evidence, the collision of the tow with the schooner must be charged to the fault of the steamer, which was responsible for her navigation.

The libel should be dismissed as against the *Excelsior*, with costs, and the libellants should have judgment against the *Atlas* for one-half their damages, with costs, with a reference to compute the damages.

THE A. R. GRAY.

(Circuit Court, E. D. New York. May 27, 1882.)

COLLISION—TUG AND TOW—FICTITIOUS DAMAGES.

Where a boat was towed out of a crowded slip stern foremost by a tug, and was drawn against the bow of a canal-boat lying in the slip, the owner of which libelled the tug and claimed \$1,000 damages for the collision, and on the trial the damage proved was a crack in the bow-stem of the canal-boat so struck,—to repair which perfectly at the present time it might be necessary to take out the stem and rebuild the bow,—while the claimant of the tug brought many witnesses to show that the crack was a "season check," the effect of weather and not the result of collision, and could have been drawn together with bolts at the time at a trifling expense, *held*, that the libel must be dismissed, on the evidence, with costs against the libellant.

T. C. Campbell, for libellant.

W. W. Goodrich, for respondent.

BENEDICT, D. J. I entertain no doubt that the claim of \$1,000, now made for damage to the libellant's boat by the collision referred to in the libel, is in great part, if not wholly, fictitious. The split in the stem which the libellant asserts was caused by the collision, but which many witnesses declare to be a "season check," may have been caused by the collision referred to; but, if such be the fact, it does not follow that any appreciable damage to the boat resulted therefrom. There is a great weight of evidence to the effect that the boat was not injured. I am entirely clear in the conviction that

there is no foundation for any such claim as the libellant has sought to establish.

The proper course, under such circumstances, is to dismiss the libel and condemn the libellant in costs.

THE VIDAL SALA.

(District Court, S. D. Georgia. April 24, 1882.)

ADMIRALTY—JURISDICTION—DOCKING CONTRACT.

A contract which stipulates with the libellants that "their charge for attending to carrying out of docking, with crew's assistance, raising steamer, clearing and keeping dock clear of water to an extent necessary for working at the shaft while she is undergoing repairs, covering, releasing, rent, and all other expenses which may be incurred in carrying out of such repairs, to be \$2,500," to be paid on the satisfactory termination of the contract, is purely maritime;—"a contract concerning the sea," over which admiralty has jurisdiction.

In Admiralty. Libel *in rem* for use of dry-dock.

Chisholm & Erwin, for libellants.

Mr. Mercer, for respondent.

ERSKINE, D. J. The libel is based upon a written contract made in the city of Savannah, between S. Fatman, as agent of the Spanish steamer Vidal Sala, then lying in the port of Charleston, South Carolina, disabled, having her propeller shaft broken, and James K. Clarke & Co., libellants. The following is a copy of the contract:

"SAVANNAH, December 31, 1881.

"*James K. Clarke & Co., City—Dear Sirs:* In confirmation of our verbal agreement, I hereby repeat that it is mutually understood and agreed between your good selves, as owners of the dry-dock, and myself, as agent of the Spanish steamer Vidal Sala, that the said steamer will enter your dry-dock upon her arrival here, for the purpose of attending to certain repairs to her machinery, and that you will have the dry-dock in readiness to receive her on Tuesday next, the second prox., unless prevented by some unforeseen accidents or impediments.

"Your charge for attending to and carrying out of docking, with crew's assistance, raising steamer, clearing and keeping dock clear of water to an extent necessary for the working at the shaft while the steamer is undergoing repairs, covering, releasing, rent, and all other expenses which may be incurred in the carrying out of such repairs, to be \$2,500, say twenty-five hundred dollars, such sum to be paid to you (libellants) by me, (Fatman,) for account of whom it may concern, upon the satisfactory termination of the contract. It is understood that the dry-dock and its owners are not to be held liable for any accident that may happen through the giving way, breaking, or other

accidents that may occur, over which they have no control. It is further understood and agreed that should the said Vidal Sala be lost before entering your dock, this contract shall be considered null and void. Please acknowledge the above and oblige, dear sirs, yours truly, S. FATMAN.

"Received just now following telegram: 'Weather permitting, Vidal Sala leaves here Monday, arriving Tuesday, to enter dry-dock, of which please take note.'"

As the question now presented for determination arises on exceptions to the jurisdiction of the court, because, as is alleged, this contract for the use or rent of libellants' dry-dock is not a contract maritime in its nature, and consequently not cognizable in the admiralty, therefore nothing more than an outline of the libel and its amendment need be given. The libellants say that they are engaged in the business of docking vessels needing repairs; that they are the owners of said dry-dock, and that it is located on Hutchinson's island, opposite the city of Savannah, and within the ebb and flow of the tide; that, assisted by the crew of the said steamer Vidal Sala, they placed her in their dry-dock, and fixed her there preparatory to the repairs which were to be made on her, and when made they removed her from the dock; that their suit is founded upon a contract civil and maritime; that the stipulated sum of \$2,500 is but a just and reasonable compensation for their labor, skill, and use of their dry-dock, its apparatus and appliances; that having fully and faithfully performed the contract, in all respects, according to its terms, they demanded the \$2,500, no part of which has yet been paid; that the said dockage was furnished on the credit of the said foreign steamer, her tackle, etc., and that the premises are true, and within the jurisdiction of this court.

Where a party seeks the aid of a court of admiralty to enforce a special contract, the entire contract must be essentially maritime in its qualities and attributes. It is not sufficient ground for admiralty jurisdiction that the contract involves some elements of a maritime nature: the substance of the whole contract must be maritime. And a maritime privilege or lien, imparting, as it does, a tacit hypothecation of the subject of it, is a strict right, and cannot be extended by construction, analogy, or inference. 4 Mas. 330, 19 How. 22.

The learned proctor for the claimant argued to show that the contract, in its totality, did not contain those ingredients which are necessary to constitute it a maritime contract, and that none of the acts done by the libellants were maritime services and gave them no lien on the vessel. In support of his views he cited and collated numerous cases. Those most prominently relied on are *Bradley v. Bolles*,

Abb. Adm. 569, and *Ransom v. Mayo*, 3 Blatchf. 70. In the first case it was ruled that work done upon a vessel in a dry-dock, in scraping the mud and barnacles from her bottom, preparatory to coppering her, is not of a maritime character, the court remarking that the services were mere shore work and menial, requiring no mechanical skill, and did not relate to repairs, or any betterment attached to her in promoting her safety or navigation, but were only preliminary to the reparation intended to be put upon her. In the other case a libel *in personam* was brought against a ship-builder to recover for damage done to a vessel in consequence of her having broken her fastenings upon the ways, as she was being hauled up to be repaired in the ship-yard. The district court dismissed the libel, on the ground that the duty of the respondent did not arise out of a maritime contract; that the contract was made upon land, and related to service to be performed upon land; and that, therefore, the case did not fall within the admiralty jurisdiction. On appeal to the circuit court, Mr. Justice Nelson concurred with the district court.

Three years later the case of *Wertman v. Griffith*, Id. 560, came also, on appeal, before the same eminent judge. It was a libel *in personam* to recover compensation for services rendered by libellant, who was the owner of a ship-yard, together with certain apparatus, consisting of a railway cradle, etc., used for hauling up vessels out of the water and sustaining them while they were being repaired. Objections were raised to the jurisdiction, upon the ground that the agreement for the service rendered must be regarded simply as a hiring of the yard and apparatus. But the court upheld the jurisdiction, and decided that the owner of the railway cradle could sue in the admiralty, although the repairs were made by other parties. Said the court: "The service requires skill and experience in the business, and is essential to the process of repair. I do not go into the question whether this is a contract made or service rendered on land or on water. It undoubtedly partakes of both characters. But I am free to confess I have not much respect for this and other like distinctions that have sometimes been resorted to for the purpose of ascertaining when the admiralty has and when it has not jurisdiction. The nature and character of the contract and the service have always appeared to me to be the sounder guide for determining the question. Although a distinction may be made between this case, in the aspect presented, and the case where the ship-master is employed to make the repairs, I am inclined to think that it is not a substantial one, and that to

adopt it would be yielding to a refinement which I am always reluctant to incorporate into judicial proceedings. A distinction, to be practical, should be one of substance, and one which strikes the common sense as founded in reason and justice." I do not see clearly how these cases are to be reconciled.

In the case of *The Bark Alexander McNeil*, Savannah News, November 26, 1874, this court held that wharfage is a maritime lien, and may be enforced in the admiralty, the court observing that "the owner and master of the ship, or the ship herself, or the proceeds arising from her sale, may be proceeded against in the admiralty to enforce the payment of wharfage, dockage, or pierage." Whatever doubt arose in regard to the correctness of this ruling is now put at rest by the supreme court of the United States in the case *Ex parte Easton*, 95 U. S. 68, where it is expressly decided that claims for wharfage are cognizable in the admiralty; and Mr. Justice Clifford, in giving the opinion of the court, said:

"These remarks are sufficient to show that wharves, piers, or landing places are well-nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water-craft is a foreign one, or belongs to a part of a state other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf. Water-crafts of all kinds necessarily lie at a wharf when loading and unloading; and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that it is the subject of admiralty jurisdiction. * * * Such erections (wharves) are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth along-side of them, to secure those objects, derive great benefit from their use."

If wharves are essential to commerce, navigation, and for the preservation of ships and other vessels, then it must follow, by parity of principle, that quays, marine piers, and docks, whether it be the common or slip-dock, or the wet-dock, where vessels are protected from the influence of the tide by closing the dock gates, not during the flowing but during the ebbing of the tide, thus keeping the vessel afloat at low water, are equally indispensable for like purposes and uses, and entitled to like maritime privileges or liens.

Opposite the city of Savannah, forming the left bank of the Savannah river, lies Hutchinson island, and there the libellants allege their dock is located. No description of it having been presented to the court, I shall endeavor to give a sketch of a dry or graving dock, presuming that these docks are similar to each other.

It is a water-tight chamber, fitted with timber or iron gates, which are shut against the tide after a vessel has entered for the purpose of being inspected or repaired. When admitted she is placed on certain blocks in the center of the dock, and as the tide recedes the water is let out until it is level with low water. And if it becomes necessary for the examination or repairing, the water below low tide is generally pumped out by steam, and the vessel must be continually shored up, as the process of emptying is carried on, that she may be kept on an even keel and prevented from straining or careening. Thus it may be seen that the work of the dock master necessitates expenditure of money (exclusive of that invested in the dry-dock proper) for apparatus and implements, and also requires mechanical skill and great care in conducting the business of docking. And notwithstanding a vessel, during inspection or repairment, may rest high and dry on the bottom of the dock, and indeed ships and other water-craft are frequently thus left alongside a wharf on the recession of the tide; yet, when a vessel enters a dry or graving dock she floats in, and when she leaves it she floats out.

Recurring to the case of *Bradley v. Bolles*, *supra*, where, as already observed, it was held that a person hired to scrape the bottom of a foreign vessel in a dry-dock before coppering, could not sue in the admiralty, the service being menial and mere shore work, requiring no mechanical skill, this decision, to my mind, divaricates from those rules and principles which govern the jurisdiction of the admiralty. But, be that as it may, the point ruled there is but approximative to the question for determination in the case at bar. *Choate, J.*, in the recent case of *The Windermere*, 2 FED. REP. 722, held that the libellant had a maritime lien for services in removing ballast from a foreign vessel, in the port of New York, for the purpose of putting her in condition to receive cargo. As to the case of *Ransom v. Mayo*, *supra*, cited by respondent, it was virtually overruled by *Wertman v. Griffith*, *supra*.

Whether a contract is maritime or not maritime depends, not on the place where it was made, but on the *subject-matter* of the contract. Some maritime contracts—those of marine insurance, bottomry, respondentia, and affreightment—are not only made on the land, but are performed on the land; the first three by payment of the money, the last by delivery of the goods and payment of the freight. *Ins. Co. v. Dunham*, 11 Wall. 1.

Fairly interpreting the entire contract, is it maritime in its nature? *Ex tota materia emergat resolutio*. It stipulates with the libellants

that their "charge for attending to carrying out of docking, with crew's assistance, raising steamer, clearing and keeping dock clear of water to an extent necessary for working at the shaft while she is undergoing repairs, covering, releasing, rent, and all other expenses which may be incurred in carrying out of such repairs, to be \$2,500," to be paid on the satisfactory termination of the contract.

The meaning of the term "docking," as employed here, and as it is ordinarily understood by mariners and dockmen, would not be satisfied by the mere entrance of the steamer into, and her departure from, the dock; many and various additional acts would be necessary to supply its well-established signification.

From the general scope of the language used in the contract in hand, it will be seen that its special and implied conditions make it, for example, the duty of the libellants when the steamer gets within the dock to place her in position, and as water flows out during the reflux of the tide, or is expelled by pumping, to keep her constantly shored up, blocked and braced, and the dock as free from water as may be necessary for examining and repairing her, and to guard her from becoming hogged, strained, blown over by the wind, or in anywise injured. And, when the reparation is completed, to safely remove her from the dock.

No authority has been presented, nor case referred to, neither has any valid reason been given why the various acts alleged to have been done in the premises by the libellants under the terms of the contract, or by reasonable intendment of it, should not fall within the category of maritime service. The employment cast upon the libellants by the contract required, *inter alia*, care and mechanical and nautical skill in its performance, and the work done must be regarded as a betterment of the steamer herself, and as appertaining to marine commerce and navigation, and absolutely essential to render her seaworthy and enable her to prosecute her voyage. I think the whole contract is purely maritime—"a contract concerning the sea." So far as my researches and information extend, this is the first time that this precise question has come before this court for decision; therefore it is to me *primæ impressionis*. The maxim of the law is to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice; and without doubt or hesitancy I pronounce for the jurisdiction and overrule the exceptions.

THE FAVORITE.

(District Court, N. D. Illinois. May 13, 1882.)

COLLISION—DAMAGES—LIMITED LIABILITY—INTEREST.

Where, in an action for damages arising from a collision, the owners of the colliding steamer applied under the admiralty rules for a limitation of their liability as such owners, and by stipulation with approved sureties agreed to make payment of the assessed value of the steamer, and thereby procured her release from arrest, *held*, that the owners were liable, in addition to such assessed value of their steamer, for the interest thereon from the date of the stipulation, with costs of the litigation.

Schuyler & Kremer, for libellants.

Richberg & Kniep and *A. McCoy*, for respondents.

BLDGETT, D. J. On the second of August, 1877, a collision occurred upon the waters of Lake Michigan between the steam-propeller Favorite, and the schooner Grace A. Channon, by which the schooner and her cargo of coal were sunk, and became a total loss. On the sixteenth of the same month a libel was filed in this court by the owners of the Channon against the Favorite, charging the collision to have occurred through the negligence of those in charge of the steamer, and claiming to recover as damages the value of the schooner and her freight. A further libel was subsequently filed by — Graham to recover damages for the death of a child who was a passenger on the schooner and was drowned by reason of the collision, and the Providence Washington Insurance Company, who had insured the cargo of the schooner, and paid the loss which accrued under their policy, also filed a libel for the amount so paid. After the filing of the libel by the owners of the schooner, and the arrest of the steamer, the Kirby Carpenter Lumber Company, who was the sole owner of the steamer at the time of the collision, applied to this court, under admiralty rules 54, 55, 56, and 57, for a limitation of its liability as such owner for damages occasioned by such collision to the value of the steamer and her freight then pending, and such steps were taken that the value of the steamer, her machinery, boats, tackle, apparel, and furniture, (there being no freight pending,) was appraised and fixed at \$12,397.80, and her owners, by stipulation, with approved sureties, agreed to make payment of that sum into court whenever ordered, and the steamer was thereupon released from arrest and delivered to her owners. Upon hearing on pleadings and proofs of the libels for damages, the court found the steamer in fault, and

directed a reference to a commissioner to take proof and report the damages sustained by the respective libellants. The commissioner reported that he finds—

The value of the schooner, at the time she was sunk by the collision, was	- - - - -	\$15,000 00
That her freight then pending amounted to \$277.50, for which she should be allowed one-half,	- - - - -	188 75
Damages in the Graham suit from the death of child,	- - - - -	1,000 00
Damages to Providence Washington Insurance Company, insurance of cargo,	- - - - -	2,500 00

Making a total of damages sustained by the several libellants, - \$18,638 75

By his report the commissioner finds that the several libellants were entitled to share *pro rata* in the amount fixed as the value of the steamer at the time of the collision; and he also finds that the Kirby Carpenter Company, having appeared as claimant in these several suits, and contested its liability and the liability of the steamer for such collision, is liable for not only the amount called for by the stipulation as the value of the steamer, but also interest upon the same at the rate of 6 per cent. per annum from the date of the collision, together with the costs incurred by the several libellants in their respective suits. Exceptions are filed to so much of the reports as charge the respondent with interest and costs; respondent, the Kirby Carpenter Company, insisting that the amount called for by the stipulation, which was the appraised value of its interest in the steamer at the time of the collision, constitutes the full measure of its liability, and that it is not liable beyond that sum for interest and costs, or either.

The only question to be considered under these exceptions, therefore, is as to the correctness of the commissioner's findings in regard to respondent's liability for interests and costs. By the fifty-fourth rule in admiralty it is provided that—

“Said court having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and upon compliance with such order the court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the court, and make due proof of their respective claims.”

It will be seen that under this rule the court may require the appraised value of the owner's interest in the vessel to be paid into court to await distribution to the several claimants, or allow the owner to retain possession of the vessel, free of liens and charges, in the premises, on his giving stipulation, with sureties, for the payment of the appraised value into court whenever ordered. In this case the owners were allowed to retain the steamer on filing a stipulation, as called for by the rule. The practical effect of doing this is to give the owners the use of the appraised value of the steamer until ordered to pay it into court. If the respondent had paid the value of the steamer into court, the court could, and doubtless would, have ordered the money to be put at interest for the benefit of the parties concerned pending the litigation. But the respondents, evidently preferring to have the use of the steamer, thereby using the money at which she was appraised, instead of paying the money into court, or conveying the vessel to a trustee, elected to give a stipulation, with sureties. It then contested not only its own personal liability, but that of the steamer, to the respective libellants for the consequences of this collision, and insisted that the collision occurred through the fault of the schooner and not from the fault of the steamer, and after forcing the libellants to an expensive and protracted litigation to establish their claims, say it is not liable beyond the amount called for by the stipulation; that it is not liable for interest, and the costs must come out of the fund.

It seems to me a bare statement of the proposition is sufficient to show its injustice and unfairness. By coming into court and seeking to have its liability limited to the value of the steamer, there would seem to be at least an implied admission that the applicant was liable for the consequences of this collision, and needed the benefit of the statute in that regard; and it might perhaps be urged that the owner could not, after such proceedings, be heard to deny its liability to the extent of the appraised value of the steamer. But the supreme court having held that, even after a decree finding the ship libelled at fault, the owner may apply for and have the benefit of this statute, it would seem that the owner has the reserved right to require the persons claiming damages to establish their case by proof; but it cannot, I think, have been the intention, either of congress in framing the statute or of the supreme court by its rules, that the ship-owner, after having had the extent of his liability limited and defined by proceedings under the statute, can enter the arena of litigation and contest the question whether he is liable at all or not at the

expense of a fund in which he has no longer any interest, which he has paid or agreed to pay into court as a condition for his discharge from further liability. To allow him to do so would be to put a premium upon the law's delay, and give the ship-owner the right to vex claimants for the fund which he has cited them into court to claim, without risk of cost to himself. The practice under this statute has been so limited in this country that but few adjudged cases are reported, and I do not find any direct adjudication on this point in our courts, although the plain intimation by the supreme court in the case of *The Wanatah*, 95 U. S. 600, is that the owners of the offending vessel are liable for costs and interest. Our statute is taken substantially from the English act of George III. and under that statute the English court of admiralty has always allowed costs, and, in a large number of cases, interest. *The Dundee*, 2 Hagg. 137; *The John Dunn*, 2 Wm. Rob. 160; *The Valiant*, 1 Wm. Rob. 64; *The Amelia*, 34 Law J. 21; *The Northumbria*, 39 Law J. 6; *Smith v. Kirby*, 24 W. R. 207.

In this case the stipulation does not, in terms, require the stipulators and sureties to pay interest, and undoubtedly the liability of the sureties cannot be extended to the payment of interest, unless it be for delay after the court has ordered payment; but I am so fully impressed with the obvious justice of the commissioner's findings that I shall overrule the exceptions to the report and order that the stipulators or their sureties pay into court the sum of \$12,397.80, mentioned in their stipulation, within 20 days from this date, and that the respondent, the Kirby Carpenter Company, also pay into court within said time the interest on the said sum of \$12,397.80, from the date of the stipulation to the present time, and that costs be awarded against the respondent in each of the suits, to be taxed by the clerk.

NOTE. That an action for damages for the death of a person lies in admiralty, see *Holmes v. O. & C. Ry. Co.* 5 FED. REP. 75, 523; *The Garland*, Id. 924; *In re Passenger & Freight T. Co.* 5 FED. REP. 599; *The Sylvan Glen*, 9 FED. REP. 335. As to limited liability of ship-owners, see *The Maria and Elizabeth*, ante, 520; *National Steam Nav. Co. v. Dyer*, Notes of Decisions, Id. 527, and cases cited.—[ED.]

THE ABBY INGALLS.

THE ALFRED A.

(District Court, D. Massachusetts. April, 1882.)

1. COLLISION—RULE OF THE ROAD—VESSEL CLOSE-HAULED.

Where two vessels are meeting, end on or nearly end on, the one close-hauled on the starboard tack and the other having the wind on her port side, the vessel close-hauled has the right of way by the well-settled rule of the road.

2. FAULT—NEGLECT OF LOOKOUT.

Where the lookout failed to see the lights of the approaching vessel until too late to avoid the collision, liability attaches from such fault.

John Lathrop, for owners of the *Alfred A.*

J. C. Dodge and *F. Dodge*, for owners of the *Abby Ingalls*.

NELSON, D. J. These are cross-libels for a collision between the schooner *Abby Ingalls* and the sloop *Alfred A.*, which took place on the thirtieth of July, 1875, at 10 p. m., about four miles south-east of Highland light, on Cape Cod. In the libel in behalf of the *Alfred A.* it is charged that the wind, at the time of the collision, was varying from W. by S. to W. S. W., blowing fresh, and the course of the *Alfred A.* was N. by W.; that the lookout saw a red light on another vessel about a quarter of a mile distant, and about half a point on the weather or port bow; that the helm of the sloop was thereupon put hard to port to keep the vessel off; that the approaching vessel, which proved to be the *Abby Ingalls*, also kept off, although the mate of the *Alfred A.* shouted to the schooner to put her helm hard down; and that the schooner run into the sloop, striking her on the port bow. The case stated in the libel in behalf of the *Abby Ingalls* is that the wind was blowing from about S. W. by W., a fresh breeze, and varying slightly; that the schooner was steering close-hauled by the wind on the starboard tack, and pursuing a general course of about S. by E.; that the lights of the sloop were first seen a few minutes before the collision about one-half or three-quarters of a point over the port or lee bow of the schooner; that the sloop came straight on, luffing a little as she approached the schooner, and immediately struck the schooner on her port bow; and that the schooner made no change of course whatever, except to put her helm to port, when the sloop was so near as to render a collision inevitable, to ease the force of the blow.

I am of the opinion that the evidence sustains the allegations of the respective libellants as to what took place on board their own vessels;

and that the Alfred A. did not luff, but kept off; and the Abby Ingalls did not keep off, but kept her course, and ported her helm only when the collision was inevitable, and then only to ease the blow. It is also clearly proved that the Abby Ingalls had a competent lookout forward, and had both her lights set and burning. The parties agree that the wind was varying. Its precise direction is not material, as the Abby Ingalls was not laying her course, but was close-hauled, steering by the wind. It thus appears that the two vessels were meeting, end on, or nearly end on, so as to involve risk of collision; that the Alfred A., having the wind on her port side, ported her helm; and that the Abby Ingalls, close-hauled on the starboard tack, and steering by the wind, kept her course. It seems to be well settled that under such conditions the vessel close-hauled on the starboard tack, has the right of way. *Bentley v. Coyne*, 4 Wall. 509; *The Ontario*, 2 Low. 40, affirmed on appeal; *Swift v. Brownell*, 1 Holmes, 467; *The Mary Doane*, 2 Low. 428. The reason is that in the case of a sailing-vessel on the port tack, whether close-hauled or not, the effect of porting her helm is to go off before the wind, and the command is preserved; but if she is close-hauled on the starboard tack the effect of porting is to bring her head up against the wind, so as to render her unmanageable. By the well-settled law of the road, the Abby Ingalls had the right of way, and by keeping her course until the collision was inevitable, performed her whole duty.

I am of the opinion that the accident happened from the failure of the lookout of the Alfred A. to see and report the schooner in season. It appears from the testimony of the pilot, who was at the wheel, that the first he knew of the approach of the schooner was from the lookout calling out to him, "Do you see that vessel ahead?" to which the pilot replied, "No; let me know in season." Directly after this the word came from the lookout, "Hard a-port." The wheel was at once put hard to port, and the sloop swung off from two to three points; but too late to avoid the collision. This very plainly shows that they were close upon each other when the lookout first saw the schooner. The atmosphere was clear, without haze or fog; and there was no reason why the schooner's lights could not have been seen by the lookout in ample season to avoid the collision.

The libel of the Alfred A. against the Abby Ingalls is to be dismissed, with costs; and in the case of the Abby Ingalls against the Alfred A. there is to be an interlocutory decree for the libellants.

Ordered accordingly.

THE ROMAN.*

(District Court, E. D. Pennsylvania. March 31, 1882.)

1. ADMIRALTY—COLLISION—FAILURE TO DISPLAY TORCH—INFLAMMABLE CARGO.

The fact that a vessel carries a deck load of pine wood will not relieve her from liability for a collision caused by the failure to exhibit a lighted torch upon the approach of a steamer and the substitution of a less brilliant light in place thereof.

2. SAME—NEGLIGENCE OF STEAMER—FAILURE TO SEE LIGHT.

If in such case the light actually exhibited should have been seen by those in charge of the steamer in time to avoid the collision, and the failure to see such light contributed to cause the collision, the loss will be apportioned between both vessels.

Libel by the master of the schooner Theresa Wood against the steam-ship Roman, to recover damages for injury to the schooner by collision. The following facts appeared from the testimony: The collision occurred in the Atlantic ocean off Great Egg harbor. The night was dark, but not stormy. The schooner was loaded with pine wood, and carried a deck load of the same material. She had only her jib-sail set, the other being lowered. She was standing off shore, heading a little to the E. S. E., and was making no headway. The steamer was on a course N. E. by E., and was seen from the schooner when the vessels were about a mile and a half distant. No lighted torch was shown, as required by act of congress, but instead thereof a globe lantern, containing a bright light, was swung by the mate standing in the stern of the schooner. The respondents alleged that this light was insufficient, and was not seen from the steamer, and that the collision occurred through the failure of the schooner to exhibit a proper light. The libellants alleged that the inflammable nature of the cargo rendered the lighting of a torch on deck dangerous, and that they were authorized, by a notice of the secretary of the treasury issued September 22, 1871, to substitute in such case a globe light therefor; that the light substituted should have been seen from the steamer, and was actually seen by some of the crew; and that the collision was caused by the bad steering of the steamer. Upon the question as to the sufficiency of the light, and whether it was seen from the steamer, the testimony was conflicting.

John A. Toomey and Henry R. Edmunds, for libellant.

Henry G. Ward, for respondents.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

BUTLER, D. J. Both vessels were in fault; the schooner for failing to display a torch, and the steamer for failing to see the light substituted for it. The torch is required by statute; and the circumstances of this case exhibit no excuse for not displaying it. The light substituted was much less brilliant and effective. Still this light could, and should, have been seen by the steamer, if displayed in time; and I believe it was so displayed. The uncertainty of witnesses respecting time and distance is fully appreciated. Still, if the libellant's witnesses are truthful it cannot well be doubted that this light was exhibited when the steamer was some hundreds of yards off. They are corroborated in this by a member of the steamer's crew, who declared, immediately after the collision, that he saw the light and reported it to the mate, in time to avoid the collision. I say "one of the crew," because the circumstances fully justify this inference. The ingenious argument based upon the position of the steamer's lights, as seen, or supposed to have been seen, by libellant's witnesses, is neither conclusive nor safe. There is even more uncertainty here than in the matter of time and distance before referred to. The order in which the respective lights came into view of the several witnesses depended upon a variety of circumstances.

Each vessel should bear a part of the loss, and a decree will therefore be entered for half damages.

Patents.

LEHNBENTER v. HOLTHAUS, 21 O. G. 1783. Appeal from the circuit court of the United States for the eastern district of Missouri. The case was determined in the supreme court of the United States on March 6, 1882, Mr. Justice *Woods* delivering the opinion, reversing the decree of the circuit court which dismissed the bill, and remanding the cause for further proceedings in conformity with the opinion of the supreme court.

In an action for infringement of a design patent, where comparison of the drawing appended to the patent with the cut of the circular, which it is admitted represents articles manufactured and sold by defendants, makes it clear that the latter is a servile copy of the former, excepting a slight inclination backward, hardly perceptible, of the glass constituting the front of the elevated portions of the show-case, the subject of the design, it is an infringement of the patented design. The patent is *prima facie* evidence of both novelty and utility, and the fact that it has been infringed by the defendants is sufficient to establish its utility, at least, as to them. Citing *Whitney v. Mowry*, 4 Fish. 207

Patent—Reissues—Enlarging Scope of Original.

MATTHEWS v. BOSTON MACHINE Co. Appeal from the circuit court of the United States for the district of Massachusetts. This case was determined on appeal in the supreme court of the United States on March 27, 1882. Mr. Justice *Bradley* delivered the opinion of the court affirming the decree of the circuit court.

Where complainants, in their reissue, split up and divided the elements of their invention, and claimed them separably and not in combination, it is an enlargement of the scope of their patent; and where no one could infringe the original patent unless he uses all the elements of the combination, and any one will infringe the reissue who uses any of the elements which, in the reissue, are separably claimed, such reissue is void. Where there is a wide departure from the original invention, and not only for a broader claim made many years after the original was granted, but for a different invention, the reissue cannot be sustained.

George Harding and George L. Roberts, for appellants.

Causten Browne, for appellees.

Patents—Reissues—Laches.

BANTZ v. FRANTZ. Appeal from the circuit court of the United States for the district of Kentucky. This case was determined in the supreme court of the United States on March 20, 1882, Mr. Justice *Woods* delivering the opinion of the court and affirming the judgment of the circuit court.

Where, under the original patent, suit could be maintained only against those who employed the combination embracing all the distinct contrivances described in the reissued patent, a reissue which claims each device separably is too broad, and consequently void. If any correction was desired it should have been applied for immediately—the right is abandoned and lost by unreasonable delay. *Miller v. Bridgeport Brass Co.* 3 Morr. Trans. 419, followed.

Patents—Terms of Art—Extrinsic Evidence.

HEALD v. RICE. Error to the circuit court of the United States for the district of California. This was an action at law brought to recover damages for an alleged infringement of reissued letters patent granted for improvements in steam-boilers. The invention consisted, among other things, of a combination of a straw-feeding attachment with the furnace door of a return-flue steam-boiler for the use of straw alone as fuel in generating steam ample for practically operating steam-engines. The case was tried by a jury and resulted in a verdict and judgment for plaintiff, to reverse which the writ of error is prosecuted. The supreme court of the United States rendered its decision on March 6, 1882, reversing the decision of the circuit court. Mr. Justice *Matthews* delivered the opinion of the court.

Where the question of identity of the invention in the original and reissued patents is to be determined by their face from mere comparison, and if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art or to apply the descriptions to the subject-matter, so that the court is able from mere comparison to say what are the inventions described in each, and to affirm from such comparison that they are not the same, then the question of identity is one of pure construction and not of evidence, and consequently is matter of law for the court, without any auxiliary matter of fact to be passed on by the jury, where the action is at law. Where it appears from the mere reading of the two specifications that the invention described in the first was for a return-flue boiler, while that described in the second, abandoning the claim for the boiler itself, is for a particular mode of using it, with straw as fuel, by means of an attachment to the furnace door for that purpose, they are essentially diverse, and the patent lawfully issued for one cannot be surrendered as the basis for a reissue for the other. A new and analogous use of an old device operating in the very manner intended by its inventor, and its use in the new application, is not the subject of a patent.

George Harding and John H. Boalt, for plaintiff in error.

M. A. Wheaton, for defendant in error.

Patents—Change of Method.

WILSON PACKING CO. v. CHICAGO PACKING & PROV. CO., AND WILSON PACKING CO. v. HUNTER, (two cases.) Appeals—the former from the United States circuit court of the northern, and the latter (two cases) for the southern district of Illinois. By stipulation of the parties these cases were argued together as one case. They were decided in the supreme court of the United States on May 8, 1882. Mr. Justice *Woods* delivered the opinion of the court affirming the decrees of the court below dismissing the bills. In reissued letters patent granted for improvements in processes of preserving and packing cooked meats, a change in the mode of cooking the meat from broiling, roasting, or steaming, to boiling, all the other parts of the process remaining unchanged, is not an invention which will entitle the party who suggests the change to a patent for the process. Where all the elements in the process are old and are merely aggregated, and the aggregation brings out no new product, nor any old product in a cheaper or otherwise more advantageous way, the

claim cannot stand; and where the second claim is for the product made by the process described in the first claim, it is invalid for want of invention and for want of novelty. Where there is nothing new in the shape, construction, or material of the cans used in packing the meats there is no invention, and the patent is invalid for want of novelty.

Wm. Henry Clifford and John N. Jewett, for appellants.

L. L. Coburn and John W. Noble, for appellees.

The cases cited in the opinion were: *Pearce v. Mulford*, 102 U. S. 112; *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498; *Hotchkiss v. Greenwood*, 11 How. 248; *Stimpson v. Hardman*, 10 Wall. 117.

The case of *WILSON PACKING CO. v. CLAPP*, on appeal from the circuit court of the United States for the northern district of Illinois, was disposed of at the same time, upon the views expressed in the above cases.

Patents—Reissue—Abandonment of Invention.

GUIDET v. CITY OF BROOKLYN. Appeal from the circuit court of the United States for the eastern district of New York. The invention in this case covered by the reissue was for chamfered edges of the broadsides of paralleloiped blocks of stone used in street pavements. The specification in the claim on the reissue is that if blocks are selected with their sides rough enough, joints can be made that will furnish a suitable foothold without the use of strips and without chamfering. The case was determined in the supreme court of the United States on April 17, 1882, Mr. Chief Justice *Waite* delivering the opinion of the court affirming the decree.

Where it was shown that if stone were used with rougher side surfaces than those found in old pavements, and that all artificial means of keeping the transverse joints open might be abandoned and the requisite surface secured, it was simply carrying forward an old idea, and doing what had been substantially done before, but with better results. Such a change is only in degree, and is not patentable.

Admiralty—Jurisdiction.

EX PARTE GORDON. This was an application by the owner of the British steamer *Leversons* for a writ of prohibition to restrain the district court of the United States for the district of Maryland, sitting in admiralty, from proceeding further in a cause begun against his vessel to recover damages for the drowning of certain persons in consequence of a collision on Chesapeake bay, caused by the fault of the steamer. The case was decided in the supreme court on January 9, 1882, when the petition for the writ of prohibition was denied. Mr. Chief Justice *Waite* delivered the opinion of the court.

The district courts having the power to hear and decide all cases arising under this jurisdiction when a prohibition is applied for, the question presented is not whether a libellant can recover in the suit he has begun, but whether he can go into a court of admiralty to have his rights determined. Where the injury complained of was the result of a collision it is a subject of admiralty jurisdiction; and the question whether pecuniary damages are to be awarded for the loss of life in the collision may properly be decided by the admi-

ralty court. If the district court entertains such a suit, appeal lies from its decision to the circuit court, and from there, here, if the value of the matter in dispute is sufficient.

Stewart Brown and Arthur Geo. Brown, for petitioner.

John H. Thomas, contra.

The cases cited in the opinion were: *The Belfast*, 7 Wall. 637; *Smith v. Brown*, Law Rep. 6 Q. B. 729; *The Franconia*, Law Rep. 2 P. D. 163; *The Guldfaxe*, Law Rep. 2 Adm. & Ec. 325; *The Explorer*, Law Rep. 3 Adm. & Ec. 289; *The Charkieh*, Law Rep. 8 Q. B. 197.

See *The Leversons*, 10 FED. REP. 763.

Admiralty—Jurisdiction—Prohibition.

EX PARTE DETROIT RIVER FERRY CO. Petition for writ of prohibition. This case is in all its material facts like that of *Ex parte Gordon*, just decided. It was determined on the same day, and the decision was delivered by Mr. Chief Justice *Waite*, denying the writ.

In an action for damages for death caused by a collision, an appeal will lie to the circuit court in favor of libellant if he is defeated, and in favor of respondent if the recovery exceeds \$50. It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise

Same.

EX PARTE HAGAR. This was a hearing on petition for a writ of prohibition brought to restrain proceeding in the district court of the district of Delaware, sitting in admiralty, from further action in a suit pending for the recovery of half pilotage claimed to be due under the statutory regulations of Delaware. Mr. Chief Justice *Waite* delivered the opinion of the court denying the writ.

Claims for pilotage fees are within the jurisdiction of the admiralty, and such being the case under the decision just rendered *Ex parte Gordon*, the district court can properly hear and decide the matters in dispute, and prohibition will be denied.

H. G. Ward and R. C. McMurtrie, for petition.

George Gray, Edward G. Bradford, Henry Flanders, and Thomas F. Bayard, contra.

Cases cited: *Ex parte McNeil*, 13 Wall. 236; *Hobart v. Drogan*, 10 Pet. 108.

CRESCENT CITY LIVE-STOCK, LANDING & SLAUGHTER-HOUSE Co. v.
BUTCHERS' UNION LIVE-STOCK, LANDING &
SLAUGHTER-HOUSE Co.*

(Circuit Court, E. D. Louisiana. April 25, 1882.)

1. JURISDICTION.

When there is a federal question involved in the suit, the circuit court has jurisdiction without regard to the citizenship of the parties.

2. LIS PENDENS.

The pendency of a similar suit between the same parties in the state court is not sufficient ground in law to sustain a plea of *lis pendens*:

Stanton v. Emery, 93 U. S. 554.

Ins. Co. v. Brune, 96 U. S. 588.

3. EQUITY PLEADING—RULES 32 AND 37.

Under the thirty-second rule in equity a defendant may demur to part of a bill, plead to a part, and answer to the residue; and under the thirty-seventh rule no demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by the demurrer or plea; but there is no rule which allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time.

Thomas I. Semmes, Robert Mott, and Henry Kelly, for complainant.
B. R. Forman, for defendant.

PARDEE, C. J., (BILLINGS, D. J., *concurring*.) This cause has been set down for hearing, and heard, on demurrer and pleas. The demurrer is a general one, going to the whole bill. The questions raised by it have been practically disposed of on the hearing heretofore had for a preliminary injunction. As we adhere to our opinions given on that hearing, the demurrer must be overruled.

The first plea sets up a forfeiture of complainant's charter and rights by reason of having removed the grand slaughter-house, as originally located on the right bank of the Mississippi river, under the provisions of act No. 118 of 1869, to the left bank of the river. This plea is insufficient, as, under the terms of said act 118 of 1869, such removal would not work a forfeiture of complainant's charter and exclusive rights, even if such forfeiture could be inquired into collaterally.

The second plea is to the jurisdiction of the court, on the ground that both complainant and defendant are citizens of Louisiana. The federal question involved in this suit, to-wit, the constitutionality

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

of certain articles of the constitution of the state of Louisiana under which the defendant claims and exercises rights which impair the validity of complainant's contract, making a case in equity arising under the constitution and laws of the United States, gives the court jurisdiction. This is no longer an open question.

The third plea sets forth that there is a suit between the same parties on the same causes of action depending in the state court. This plea is insufficient in form and substance in not showing when the suit in the state court was commenced,—whether prior or subsequent to this suit; whether issue was joined, etc. See Story, Eq. Pl. § 737. And it is insufficient in law. *Stanton v. Ebury*, 93 U. S. 554; *Ins. Co. v. Brune*, 96 U. S. 588.

The fourth plea avers certain articles of the Louisiana constitution of 1879, abolishing monopolies and giving the regulation of slaughter-houses to the municipal corporations, which latter have enlarged the limits within which slaughtering of animals for food may be done. The effect of the article of the Louisiana constitution abolishing monopolies, as affecting complainant's rights, has been passed upon in this case. We still adhere to the opinion that complainant's exclusive right, contracted under act No. 118 of 1869, is not affected by the constitution of 1879. This plea also must be held insufficient.

We notice that with the demurrer to the whole bill and four separate pleas, each going to the whole bill, there is also filed an answer to the whole bill, in which all the matters averred in the pleas are again set forth. Under the thirty-second equity rule a defendant may demur to part of a bill, plead to part, and answer as to the residue. Under the thirty-seventh equity rule no demurrer or plea shall be held bad and overruled upon argument only, because the answer of the defendant may extend to *some* part of the same matter as may be covered by such demurrer or plea. But we do not understand that there is any rule that allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time. The effect of such pleading is that the plea is taken as waiving the demurrer, and the answer as waiving the plea. See Daniell, Ch. 787, 788.

In this view of the case, as well as for reasons before given, the demurrer and pleas filed herein should be overruled. And it is so ordered.

See same case, 9 FED. REP. 743.

OGLESBY and others v. ATTRILL.*

(Circuit Court, E. D. Louisiana. April, 1881.)

1. EQUITY PRACTICE AND JURISDICTION—BILL FOR A NEW TRIAL.

A bill for a new trial in an action at law, on account of frauds practiced and perjuries committed by plaintiff and his witnesses at the trial at law, which have been discovered since the term at which the judgment at law was rendered, cannot be filed in any court other than the one before which such trial was had and which rendered such judgment.

2. SUBSTITUTED SERVICE.

In such a case service of process upon the attorney who represented the defendant in the action at law in which he was plaintiff, in the absence of the said defendant from the district, adjudged to be good.

Richard De Gray, Charles B. Singleton, and Richard H. Browne, for complainants.

Thomas J. Semmes, for defendant.

BILLINGS, D. J. The question now submitted is solely as to the validity of a service of a subpoena upon the attorney of a party who does not reside within the district of Louisiana. The facts necessary to properly apply the principles of law to the case are as follows: Henry Y. Attrill, who resides in New York, commenced a suit at law in the United States circuit court for this district against J. H. Oglesby and Jules Cassard, who set up by way of counter-claim (or, as it is termed by the Code of Louisiana, by way of "reconventional demand") a cause of action. This twofold cause was tried by a jury, and a verdict rendered against the demand of the plaintiff (Attrill) and the demand of the defendants, (Oglesby and Cassard.) Upon this verdict judgment was entered. A writ of error was sued out by the defendants, and upon this writ the cause is now before the United States supreme court.

Oglesby and Cassard have filed a bill in equity, which, if considered according to the nomenclature of bills in chancery, would be denominated a bill for a new trial in an action at law on account of frauds practiced and perjuries committed by plaintiff and his witnesses at the trial at law, which have been discovered since the term at which the judgment at law was rendered. If considered according to the terminology of our Code it would be classed among actions to annul a judgment on the ground that it had been obtained through false swearing. Whether considered as a suit in equity or an action

*Reported by Joseph P. Hornor, Esq. of the New Orleans bar.

under the Code, the object of the suit is to set aside a judgment in order that a new trial may be had.

This suit, therefore, is not simply a suit to impeach a decree for fraud, but it is a suit to obtain a new trial; for the judgment simply denied the right of complainants to answer, and gave no damages against them.

I do not see how a bill for a new trial can be filed in any other court than this. It is not like a bill for discovery, which could be entertained by any court with equity jurisdiction. If it were simply a bill to impeach a decree *pro tanto*, it would, as Mr. Justice Bradley remarks, in *Barrow v. Hunton*, 99 U. S. 85, upon the authority of *Gaines v. Fuentes*, fall within the class of original bills.

In *Gaines v. Fuentes* the court very cautiously say, (92 U. S. 17:) "The action, though in form to annul an alleged will and recall the decree of its probate, since the petitioners are not heirs nor next of kin, is simply a suit brought against a devisee by strangers to annul a will as a muniment of title, and to restrain the enforcement of the decree establishing it so far as it affects their property," and distinguish the case from that of the case of *Broderick's Will*, 21 Wall. 503, when the action was a suit brought by the heirs to altogether set aside a will and the decree by which it was admitted to probate. The *Gaines Case* was held to be removable; the *Broderick Case* could not be removed. But this is more than a bill to impeach. No other court than this could give the complete relief which the case of the complainants demands, for no other court could render a decree which could do more than operate upon the parties; while the case demands that there should be a decree which will operate on the adverse judgment, remove it altogether as an impediment to the affirmative relief sought by complainants in their action at law, and give them a new trial in that action.

The nature of an application for a new trial, as to whether it is an original or incidental proceeding, is the same whether it be presented by a motion or a bill. It is only a difference in formality. In one case it is made during the term; in the other after its termination. In either case its effect, if granted, is to restore the parties to the situation which they occupied before the verdict. In either case it is not only an incident of a cause depending, but it is inseparable from it.

The case of *Ward v. Sibring*, 4 Wash. C. C. 472, is very instructive, and comes nearest to laying down the principle which should con-

trol this case. After referring to the inhibition contained in the eleventh section of the judiciary act of 1879, (Rev. St. 739,) restricting the institution of suits by original process against an inhabitant of the United States, save in the district whereof he is an inhabitant or in which he shall be found, the court observes: "Now, this court has never considered this section as applying to injunctions to stay proceedings at law, or to cross-bills, because, strictly speaking, they are not original suits, nor are they within the meaning and policy of the restriction." He then quotes from Cooper's Treatise on Equity Pleading, page 44, where he (Cooper) characterizes bills not original as being those which are filed for the purpose of cross-litigation of matters already depending before the court, of controverting, suspending, avoiding, or carrying into execution a judgment of the court. Justice Washington then proceeds to say that "the practice of the court directing service of the subpoena on the attorney of the plaintiff at law in cases of injunctions, and on the solicitor of the plaintiff in the original suit, when a cross-bill is filed, is founded on the necessity of the case; the plaintiff in the action at law and in the original suit in equity in most cases residing out of the district in which the court sits, and there being no remedy for the party unless it is afforded by entertaining those suits and countenancing a service on the law agent against the non-resident party; for it is not competent for the chancery court of one district or state to enjoin the proceedings at law in the circuit court of another district, and it is obvious that a cross-bill can only be filed in the court where the original bill is depending." The basis of the reasoning here includes this case. The reason why the injunction bill and the cross-bill are held to be adjuncts of the first suit, is that they could not be brought in any other court than that in which the first suit was depending, as no other court could administer the necessary remedy. This is equally true of a bill to annul a judgment and for a new trial where the judgment is such as is the judgment here, a mere denial of the redress sought by the complainants in their action at law, and where, therefore, no mere restraining process issued in another district, and operating solely upon parties, could be effective. The intention of congress in limiting the use of original process to cases of inhabitants of the district in which the suit was brought, unless the parties sued were found there, was to prohibit the dragging of parties defendant from the places of their residence to distant parts of the Union for the trial of causes not instituted by them. This limitation was not designed to include a case where, as here, a demand is made by parties against a plaintiff;

which is a prosecution inseparable from a cause which that plaintiff has himself instituted. The process which is issued as a notice to the plaintiff in such a case is not "original;" it is incidental, ancillary, a step in a pending cause. It is not a process which originates a cause, but it merely prolongs one already commenced.

The plea to the return is overruled, and the service upon the attorney is adjudged to be good. The respondent may have time to answer as if the service of the subpoena had been made to-day.

HILL, Assignee, v. AGNEW, SCALES & Co. and others.

(District Court, N. D. Mississippi. December Term, 1881.)

1. ASSIGNMENT IN TRUST FOR CREDITORS—WHEN FRAUDULENT.

A conveyance in trust for the benefit of creditors, which provides for crops to be thereafter planted, and for a sale of supplies to the laborers, with no provision that the trustees shall have any power to control the laborers, or over the completion or gathering of the crops, is fraudulent in law and void as to creditors.

2. SAME—PROVISION FOR ATTORNEY'S FEES.

It is no objection to a conveyance in trust for the benefit of creditors that a provision is made for the payment of a reasonable attorney's fee for the examination of the facts, advice, and drawing up the assignment and securing its proper proof or acknowledgment and placing it on record; but the debtor has no power to contract with attorneys for any further services, which is a matter entirely within the control of the trustees, and for which the assignees will be allowed a reasonable sum.

3. SAME—VICE MUST BE APPARENT.

To declare a conveyance fraudulent *per se*, the vice must be apparent on the face of the instrument, without reference to extrinsic proof.

4. SAME—ILLEGAL PREFERENCE.

Where such an assignment, after providing for different classes of creditors to be preferred, and then for a distribution of the surplus among those not preferred, and the surplus to the grantor, contained the following provision, "provided, however, that the said party of the second part, or his successors, shall pay no claims unless the correctness of the same shall be established to his satisfaction," the directions extending to all claims, and not restricted to the creditors not named, is fraudulent and void as to the creditors named.

5. SAME—UNFAIR ADVANTAGES.

Where the assignment gives the first class of creditors the right to determine whether or not the assignee shall give a bond, and if so, to fix the amount, it gives an unfair advantage over other creditors, and is a circumstance to show fraud, but not sufficient to show it fraudulent *per se*.

HILL, D. J. This bill was filed in the chancery court of Chickasaw county against the creditors of T. R. Sadler, who had made a

general assignment of all his estate to complainants, praying that they might be enjoined from prosecuting their suits so as to obtain satisfaction out of the estate conveyed of the sums due them respectively. By the order of the circuit judge for that district an injunction was granted in accordance with the prayer of the bill. Agnew, Scales & Co., creditors of said Sadler, had sued out their attachment in the circuit court of Chickasaw county, and caused the same to be levied upon the property so conveyed, and in the hands of complainant as such trustee. Under the provisions of the act of congress of 1875, Agnew, Scales & Co. removed this cause as to them to this court, and have also removed their attachment suit to this court, and now move to dissolve the injunction against them for the alleged reason that the conveyance under which complainant claims the property attached, contains provisions in it which render it fraudulent in law as to them; and whether this is so or not is the only question now for decision.

The first provision which it is alleged has this effect is as follows:

"And the said party of the second part, (the trustee,) in order to promote the interest of the creditors of the said party of the first part, is hereby authorized to carry out the agreement of the said first party with the laborers on his plantation; to furnish them actual necessary family and farming supplies, in order to enable said laborers to cultivate and gather the crops already planted, and to be planted, on the plantations of the said first party, hereby conveyed, planted, and so invested to be planted, during the year 1881."

This provision contemplated a sale of the supplies then on hand necessary for the purposes mentioned, and, if not a sufficiency then on hand, the purchase of such as might be needed for that purpose, and a sale to the laborers. In other words, so far as it related to these laborers, the business, for the time and purpose mentioned, was to be carried on as it had been done by the grantor.

It is difficult to perceive any substantial difference between the exercise of such a power and the action of the trustee in the case of *Richardson v. Marjuez*, recently decided by the supreme court of this state, and not yet reported, and which was condemned by the supreme court, and for which the trustee was removed and a receiver appointed. The court, in that case, decided that the power was not given to the trustee in the deed, and, had it been, it would have rendered the assignment fraudulent and void. The action on the part of the trustee so condemned, was the furnishing parties who had contracted with the grantors the necessary supplies for the crop year, and who had given trust deeds to secure the payment thereof.

It is insisted in this case that it would have been a great hardship upon the laborers who had planted their crops, and who had depended upon obtaining their supplies under their contracts; and further, that it was to the interest of the creditors that the contracts should be carried out; and there is force in the argument. But the same argument would sustain the action of the trustee which the supreme court has condemned as fraudulent, had the power been given. So far as the assignment in this case shows, there was no overpowering necessity for the grantor to have made it until after the crops had been made and gathered, and, if there had been, it is difficult to perceive any difference, or that it would have placed the laborers in a worse condition than they would have been had the property been seized under execution or attachment. It is one of the misfortunes which befalls parties when they contract with those who either will not or cannot comply with their agreements.

When a debtor makes an assignment of his property he parts with all control over it; the assignee takes it, and is authorized to convert it into money and apply it to the satisfaction of the trusts imposed. In doing so, he may, for a limited time, so as to make available materials on hand, continue the business, by the employment of laborers, and the purchase of limited and necessary materials; but all to be under the immediate control of the trustee. The trustee may also employ laborers to complete a crop planted, or to gather it and prepare it for market. But this conveyance provides for crops to be thereafter planted, and for a sale of supplies to the laborers. There is no provision that the trustee shall have any power to control the laborers, or the completion or gathering of the crops; it is a power inconsistent with an assignment of this character, and which renders this conveyance as to these defendants fraudulent in law and void.

The next provision in the assignment which it is alleged renders it void, is as follows:

"And with and out of the proceeds of the plantations, sales, and collections, the said party of the second part shall pay all the just and reasonable expenses, costs, charges, and commissions of making, executing, and carrying into effect this assignment, and the trusts hereby created, together with the sum of \$1,000 to Buchanan & Houston, for their services as lawyers in and about the premises, and together with their authority as to the execution of the trusts hereby created."

The provision for the payment of the attorney's fees is the one to which objection is made. It is no objection to the conveyance that provision was made for the payment of a reasonable attorney's fee,

for the examination of the facts, advice, and drawing up the assignment, and securing it properly proven or acknowledged and placed on record. But at this point the control of the grantor ceases; he has no power to contract with attorneys for any further services; that is a matter entirely within the control of the trustee. The only authority referred to holding a contrary doctrine is a case decided by the supreme court of Texas, in which it is said that the grantor may designate the attorney to be employed by the assignee. I do not know the facts in that case, but if it holds that the grantor in such a conveyance may contract with the attorney for services to be performed after the assignment is made, or that the assignee is bound by the designation of the grantor, in a general assignment of an insolvent estate, I am of opinion that such a rule is violative of a sound rule on the subject, and cannot follow it.

But to declare a conveyance fraudulent *per se*, the vice must be apparent on the face of the instrument itself, without reference to extrinsic proof. This conveyance does not come up to this rule, but from its face leaves it in doubt whether the understanding between the parties was that the services of the attorneys should close with putting the deed on record, or to continue afterwards. If the former, the provision is not condemned except for unreasonableness in the amount, which would be a matter of proof; if the latter, it would avoid the conveyance, but would require proof to establish it; hence the assignment cannot be declared void upon its face for this reason.

An assignee will be allowed a reasonable sum paid to attorneys for their services in defending the assignment, or for other services; and a provision in the assignment directing that the costs and expenses of the trust, including reasonable attorney's fees, will not of itself vitiate the conveyance. This would be allowed if the conveyance is sustained, without such direction,—as a matter of course, if not sustained, disallowed,—but this leaves the entire contract to the assignee, and is different from a contract for such services made by the assignee.

The next provision relied upon as avoiding the assignment is that, after providing for different classes of creditors to be preferred, and then for a disposition of the surplus among those not preferred, and the surplus after that, if any, to the grantor, is the following provision: "Provided, however, that the said party of the second part, or his successors, shall pay no claims unless the correctness of the same shall be established to his satisfaction."

Had this provision been confined to the creditors not named, and in which the amounts due are not specified, it might not be held as

vitiating the assignment, as in that case it would be the duty of the trustee to be satisfied of the correctness of the debt, and consequently such direction would be harmless; but the direction is not so limited, but extends to all claims—those in which the creditor, with the sum due, is given; and where the creditor is preferred. It constitutes the assignee the sole judge as to whether he will pay the debt or not. The presumption must be indulged that the grantor knew his creditors, and the amount justly due, when he states the same in his assignment; and yet under this provision the assignee could refuse to pay the claim upon his own opinion as to whether it should be paid or not. These assignments are intended to supersede all other tribunals, so far as the subject and creation of the trusts are concerned, and an assignee has no right to appoint an arbiter without the consent of the creditor whose rights are to be affected. Again, by the exercise of the power attempted to be conferred the assignee may postpone the payment of the sums due the creditors. I am satisfied that this provision in the assignment renders it, as to the rights of these defendants, fraudulent in law and void.

Another provision insisted upon as rendering the assignment void is that it gives to the first preferred class of creditors the right to determine whether or not the assignee shall give bond, and if so fixes the amount.

I am of opinion that this provision gives an unfair advantage over other creditors equally entitled to protection, and is a strong circumstance tending to show fraud, but is not sufficient to authorize the court to declare it fraudulent *per se*.

I am satisfied, as above stated, that for the first and third reasons, relied upon by the counsel for Agnew, Scales & Co., that this conveyance must be held fraudulent as to their rights, and that the motion to dissolve the injunction granted by the circuit judge must be sustained as to them; but this does not affect the validity of the conveyance as to the assenting creditors, nor will it affect the action of the assignee in the execution of the trusts imposed, further than the application of so much of the assets conveyed as may be necessary to satisfy the judgment of Agnew, Scales & Co. should they obtain a recovery in their suit. Therefore an order will be entered dissolving the injunction to the extent stated.

*In re WILSON & GREIG, Bankrupts.**(District Court, S. D. New York. June 1, 1882.)*

1. ATTORNEY AT LAW—LIEN OF.

An attorney's lien upon an uncollected judgment is limited to his taxable costs and reasonable compensation in the cause itself, or in the same subject-matter, and may be enforced by active proceedings.

2. SAME—DEPENDS ON POSSESSION.

An attorney's general lien for the balance of his entire account extending to all papers, documents, and vouchers in his possession, depends wholly upon possession, and is a right merely to retain such papers till his bill is paid, and cannot be otherwise actively enforced.

3. SAME—EXTENT OF.

Such a general lien does not extend to a judgment uncollected by the attorney, so as to bind the proceeds, when collected by the judgment creditor or his assignee, or other attorneys who may collect the same, without the use of papers in the hands of the original attorney.

4. ATTORNEY'S FEES—AGREEMENT OF ASSIGNEE—GENERAL LIEN.

Where an assignee in bankruptcy, desiring to change the attorneys in legal proceedings which the bankrupt had instituted, received from the latter's attorneys all the bankrupt papers and vouchers, including substitution upon outstanding executions on judgments previously recovered, agreeing to satisfy the attorney's lien out of the first moneys collected in the pending suits, and the executions were afterwards returned unsatisfied, and the other attorneys of the assignee subsequently collected the first two judgments through supplementary proceedings in the nature of a creditor's bill, upon which the former attorney claimed a lien for his costs and counsel fees in a third judgment, which remained wholly uncollected, *held*, that the agreement was not binding upon the bankrupt's estate to any greater extent than the legal lien of the attorney at the time the agreement was made; that he had no lien upon the proceeds of the first two judgments for his costs and counsel fees in the third judgment, or for his general bill, the first judgments having been collected without the use of any papers in the attorney's hands at the time of the agreement; and that upon the suits not in judgment, and the papers necessary in the prosecution thereof, the attorney had a general lien; that the agreement was valid and binding to that extent, and certain proceeds of such suits having been collected by means of papers surrendered under it, the attorney was entitled to have such proceeds applied to his general bill.

Case of the *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, qualified.

5. SAME—LIEN ON JUDGMENT.

An attorney's lien upon an uncollected judgment is not increased by subsequent services in independent matters.

Hearing on report of the register upon petition of J. H. Goodwin for payment of an attorney's lien.

The assignee of the bankrupts was appointed in June, 1879. Prior thereto the petitioner had been employed by the bankrupts as their attorney in the prosecution of several suits which were pending at the time of the appointment of the assignee. The petitioner, as

attorney, had also recovered for the bankrupts, in January, 1879, two judgments against one James Wilson by default upon promissory notes for about \$877, upon which judgments executions were then in the hands of the sheriff uncollected. The assignee desiring to employ other attorneys in the prosecution of the suits pending, and the petitioner claiming a general lien upon all the papers in his hands for his costs and services, an agreement was made between him and the assignee, on June 7, 1879, reciting that the petitioner had "commenced a number of suits against persons, debtors of said Wilson & Greig, and which said suits have not been finally concluded; that the assignee recognized the petitioner's lien thereon, and desired all papers therein to be surrendered to other attorneys to be substituted;" and providing that the papers in said suits should all be transferred, and substitutions given, and that the petitioner's lien should not be waived thereby; but that the "lien should be first paid and satisfied by the first moneys coming into the hands of said assignee out of said suits, a list of which is annexed." Among the papers transferred were those in the two judgments against James Wilson, which, in the receipt given by the substituted attorneys, are recited as given under the terms and conditions of the agreement above referred to. The executions then outstanding upon these two judgments were afterwards returned wholly unsatisfied. Blumenstiel & Hirsch, the substituted attorneys, subsequently, upon proceedings supplementary to execution, in the nature of a creditor's bill, recovered the whole amount of those two judgments, being about \$1,900.

A third judgment had also been recovered by the petitioner, as attorney for the bankrupt, against Hine, Phillips, and others, upon charges of embezzlement, in which the petitioner's taxed costs were \$326.69, and in which his services were reasonably worth, as reported by the register, \$500 more, making \$826.69 for his bill in that suit; and the papers in that case were also among those transferred and receipted for. In the various other pending suits transferred the sum of \$144.57 only was collected by the assignee. All of the petitioner's claims have been paid except his bill for the recovery of the last-mentioned judgment, upon which he has received only \$43.86, leaving \$782.83 justly owing to him for his services in that suit.

The petitioner claimed a general lien upon each and all of the suits and judgments transferred for his entire bill, and that he was entitled to be paid what was due to him upon the third judgment out of the proceeds collected by Blumenstiel & Hirsch upon the two

prior judgments against James Wilson. The assignee refusing to recognize this claim, the matter, upon petition, was referred to the register, by whose report the above facts appear.

S. B. Hamburger, for claimants.

Blumenstiel & Hirsch, for assignee.

BROWN, D. J. It is not disputed that the sum of \$826.69 would be a fair compensation to the petitioner for his services to the bankrupts in obtaining the judgment against Hine and Phillips in May, 1879. Nothing, however, has been recovered thereon. All claims of the petitioner, aside from those connected with that judgment, have been paid, and the only question presented is whether the petitioner has a right to be paid the balance of \$782.83 due to him for his services and costs in obtaining this judgment out of the proceeds collected by the assignee, through his subsequent attorneys, upon the two Wilson judgments recovered in January, 1879.

The effect of the agreement of June 7, 1879, between the assignee and the petitioner, was to preserve whatever lien or equitable rights the petitioner then had. It was sufficient for this purpose; it was not intended for any other purpose; it was not approved by the court; and if its terms were in fact such as to enlarge the petitioner's claims beyond his then existing legal lien, it would not bind the bankrupts' estate, and the petitioner would be obliged to resort to his personal remedy against the assignee. The assignee, however, took the bankrupts' estate charged with whatever legal or equitable lien existed against it in favor of the petitioner, and by the agreement then made these liens were preserved as they existed at that date.

On the part of the assignee it was contended that nothing having been collected by the petitioner upon the two judgments against James Wilson, the attorney's lien thereon was limited to his taxed costs and reasonable compensation in obtaining those judgments. The petitioner contends that his general lien for his whole bill, which legally attached upon the papers in his hands, including the notes upon which the judgments were maintained, followed the judgments and legally bound whatever money was subsequently collected thereon by the assignee.

After examination of the numerous authorities on this subject, English and American, I am satisfied that the claim of the petitioner cannot be sustained, and that an attorney has no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular cause.

An attorney's lien, as now generally recognized, is of two kinds: First, a general lien resting wholly upon possession, which is a mere right to retain, until his whole bill is paid, all papers, deeds, vouchers, etc., in his possession upon which, or in connection with which, he has expended money or given his professional services. This "retaining lien" is a general one for whatever may be due to him; and, though a client may change his attorney at will, if the latter be without fault and willing to proceed in pending causes, none of the papers or vouchers can ordinarily be withdrawn from him except upon payment of his entire bill for professional services. *In re Paschal*, 10 Wall. 483, 493-6; *In re Brown*, 1 N. Y. Leg. Obs. 69; *In re Broomhead*, 5 Dowl. & L. 52; *Blunden v. Desart*, 2 Dru. & Warr. 423; *Ex parte Nesbitt*, 2 Sch. & Lef. 279; *Ex parte Sterling*, 16 Ves. 258; *Griffiths v. Griffiths*, 2 Hare, 592; *Ex parte Pemberton*, 18 Ves. 282; *Lord v. Wormleighton*, 1 Jacob, 580; *Bozon v. Bolland*, 4 Myl. & C. 354, 356; *Ex parte Yalden*, L. R. 4 Ch. Div. 129; *Colmer v. Ede*, 40 Law J. (N. S.) Chanc. 185; *Hough v. Edwards*, 1 Hurl. & N. 171; *Cross, Lien*, 216; *Stokes, Attys.' Liens*, 28, 38; 2 Kent, *641. This lien, like other mere possessory liens, is, however, purely passive, being a bare right to hold possession till payment.

The articles cannot be sold or parted with without loss of the lien, nor can any active proceedings be taken at law or in equity to procure payment of the debt out of the articles so held. *Cross, Lien*, 47, 48; *Thames Iron Works v. Patent Derrick Company*, 1 Johns. & H. 93; *The B. F. Woolsey*, 4 FED. REP. 552, 558. The statute of this state passed May 8, 1869, (Laws 1869, c. 738,) which was designed to afford means of realizing payment upon such mere possessory liens, applies only to liens "upon any chattel property." Mere choses in action, such as the notes or demands placed in the petitioner's hands for collection, are not "chattel property," (2 Bl. *387; *Ingalls v. Lord*, 1 Cow. 240; *Ransom v. Miner*, 3 Sandf. 692,) and therefore not within the statute. As this general lien of the attorney upon the notes and demands in suit depended wholly upon possession, and was a mere right of retention, incapable of any active proceedings to enforce payment, it could not be transferred, nor attach to the judgments obtained upon them or to any proceeds thereof, unless such proceeds came into the attorney's possession, which is not the fact in this case.

The second kind of lien which an attorney has is that existing upon a judgment recovered by him, or moneys payable thereon, or

upon some fund in court. This lien, so far as it extends, is not merely a passive lien, but entitles the attorney to take active steps to secure payment. It did not exist at common law. It is stated by Lord Mansfield to be not very ancient. 1 Doug. 104; Stokes, 3. It does not depend upon possession, but upon the favor of the court in protecting attorneys, as its own officers, by taking care, *ex æquo et bono*, that a "party should not run away with the fruits of the cause without satisfying the legal demands of the attorney by whose industry and expense those fruits were obtained." *Read v. Dupper*, 6 T. R. 361. As this equitable right rests solely upon the compensation due to the attorney for his services, and money expended in procuring the judgment or the fund secured, it is manifest that it cannot upon principle be extended beyond the services and expenses in the suit itself, or in any other proceedings by which the judgment or fund has been recovered, or in the same subject-matter.

The distinction between an attorney's "retaining lien" upon papers in his possession, and his "charging lien" upon a judgment or other fund, is carefully pointed out by the lord chancellor in *Bozon v. Bolland*, 4 Myl. & C. 354, 359. "The solicitor's claim upon the fund," he says, "has been called transferring the lien from the document to the fund recovered by its production. But there is no transfer; for the lien upon the deed remains as before, though perhaps of no value; and, whereas, the lien upon the deed could never have been actively enforced, the lien upon the fund, if established, would give a title to payment out of it. The active lien upon the fund, if it exists at all, is newly created, and the passive lien upon the deed continues as before. If the doctrine contended for were to prevail, the lien of the solicitor upon the fund realized would in most cases extend to his general professional demand, and not be confined, *as it always is, to the costs in the cause*; for it must very generally happen that the plaintiff's solicitor has in his hands the documents necessary to establish his client's title to the money."

In *Lann v. Church*, 4 Madd. 207, the vice-chancellor said that he "had not been able to find any case in which it had been held that a solicitor had any lien on the fund recovered in the cause, except for his costs incurred in such cause."

Such is the well-established English practice. *Stephens v. Weston*, 3 B. & C. 538; *Hodgkinson v. Kelly*, 1 Hogan, 388; *Hall v. Laver*, 1 Hare, 571, 577; *Perkins v. Bradley*, Id. 219, 231; *Lucas v. Peacock*, 9 Beav. 177; Stokes, Attys.' Liens, 138. The same principle has

been repeatedly affirmed in this country where the English practice of recognizing a lien upon a judgment has been followed.

In *Phillips v. Stagg*, 2 Edw. Ch. 108, the vice-chancellor says that "the attorney's lien is not to extend beyond the costs in this action. He cannot claim the amount of other costs due to him in other suits at law."

In *Adams v. Fox*, 40 Barb. 442, 448, *Morgan, J.*, says: "This lien is totally different from the lien upon the papers. The lien on the judgment is confined to the costs of the particular suit, and the attorney can actively enforce it. The lien on the papers is merely a right to retain them, and applies to all his bills of costs."

In *St. John v. Diefendorf*, 12 Wend. 261, the precise question presented in this case was decided adversely to the attorney's lien. Having recovered a judgment, the plaintiff's attorneys there gave notice to the defendant to pay the damages, as well as the costs, to them, on the ground that they had a demand against their client, for costs in other suits, to an amount equal to the damages. The court say: "The question is whether the attorney has a lien upon his client's money, before it comes into his hands, to satisfy the demand he has against his client for costs in other suits. * * * An attorney has a lien upon his client's papers; but he has no lien upon anything which belongs to his client until it is in his possession. The costs belong to the attorney. There can be no lien upon what belongs to another without possession." *Pope v. Armstrong*, 3 Smedes & M. 214; *Cage v. Wilkinson*, Id. 223; *The Hektograph Co. v. Fourl*, 11 FED. REP. 844.

The petitioner contends that by the law of this state, as established by the court of appeals in the case of the *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, affirming 64 Barb. 146, the lien of an attorney for his general balance, which exists upon all papers and vouchers in his possession, is extended equally to any judgments recovered or moneys collectible upon them. In that case a receiver of the plaintiff was appointed after a decree for the foreclosure of a mortgage had been obtained, but before the sale of the premises. The receiver employed Cullen & McGowan, the previous attorneys of the plaintiff, to proceed in the cause, and they afterwards caused the mortgaged premises to be sold and received the proceeds, from which they claimed to deduct not only their bill in that action, but also a bill for professional services due to them from the plaintiff in other matters preceding the appointment of the receiver, and also a third bill

due to McGowan individually for still prior services. At special term both the last-named bills were disallowed. The general term, on appeal, allowed the prior bill of the firm, but disallowed the individual claim of McGowan; and this was affirmed by the court of appeals. The court last named say: "The attorneys of the bank had a lien upon the papers in the foreclosure, not only for the costs and charges in that suit, but for any general balance in other professional business;" referring to 3 T. R. 275; 8 East, 362. Neither of those cases, however, sustain the doctrine of a general lien upon a judgment beyond the costs in the particular cause.

In the court below, *Ingraham, J.*, says, (64 Barb. 155:) "Most of the cases in which this lien [upon the judgment] is recognized are cases where the claim was for costs of that particular action in which the motion was made. But the rule is equally well settled as to any claim which the attorney has for his services, and attaches as well to the proceeds of a judgment as to the papers on which the judgment was founded." No authorities are cited for this last proposition, nor after much search have I been able to discover any in this country or in England. We have seen that, so far as respects a general lien upon a judgment, or fund in court, the authorities are all to the contrary. Where an attorney has collected money for his client, and no rights of third persons have intervened, through assignment, death, or bankruptcy, he might, doubtless, offset his own general bill. *Patrick v. Hazen*, 10 Vt. 184. In the case of the *Bowling Green Savings Bank*, however, the appointment of a receiver before the collection of the moneys prevented any legal right of set off. The moneys were collected by the attorneys upon the employment of, and as the attorneys of, the receiver; as, in the case of *Schwartz v. Schwartz*, 21 Hun, 33, the moneys were collected upon the employment and as the attorneys of the assignee. In neither of these cases does the distinction seem to be noted which has been so long established between a mere "retaining lien" upon the papers in the possession of an attorney, which is general but purely passive, and his "charging lien" upon a judgment or fund recovered, which is limited to services in the cause, but capable of being actively enforced.

Numerous prior decisions of the court of appeals have declared, like the English cases, that an attorney's lien upon a judgment is based upon the equitable consideration that it is by the attorney's labor and skill that the judgment has been recovered; the judgment

being within the control of the court, and the parties within its jurisdiction, the court will see that no injustice is done to its own officers.

In *Rooney v. Second Avenue R. Co.* 18 N. Y. 368; in *Ely v. Cooke*, 28 N. Y. 373; in *Dunkin v. Vandenberg*, 1 Paige, 626; and in many other cases, the attorney has upon this ground been regarded as an equitable assignee of the judgment to the extent of his demands in the cause. Prior to the adoption of the Code of Procedure the extent of this lien was limited to the taxable costs. The Code has made no other change than to extend the lien to any agreed or deserved compensation. *Marshall v. Meech*, 51 N. Y. 140, 143; *Haight v. Holcomb*, 7 Abb. Pr. 210; *Ackerman v. Ackerman*, 14 Abb. Pr. 229.

Harris, J., in the *Case of Rooney*, above cited, says that the attorney is now "to be regarded as the equitable assignee of the judgment to the extent of his claim for services in the action." In the same case *Comstock, J.*, says: "The attorney is entitled to a lien, as against his client, because his labor and skill contributed to the judgment, * * *" and he "has an interest in the judgment either to the amount of those, or for some other amount which he is entitled to claim (by agreement or on the *quantum meruit*) as the measure of his compensation."

In *Marshall v. Meech*, 51 N. Y. 143, the court say that the "attorney has a lien for his costs and compensation upon the judgment recovered by him. Such a lien existed before the Code, and is not affected by any provision of the Code. The lien exists, not only to the extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have as a compensation for his services. To the amount of such lien the attorney is to be deemed an equitable assignee of the judgment."

In *Wright v. Wright*, 70 N. Y. 100, the court say: "The attorney had a lien for the amount of his costs and agreed compensation upon the judgment, and to that extent may be regarded as an equitable assignee of the judgment." See, also, *Ward v. Syme*, 9 How. Pr. 16.

Neither in the decisions nor in the principles announced in any prior cases do I find any warrant for holding that an attorney has any lien upon an uncollected judgment beyond his compensation in the particular cause.

In the case of *Wolfe v. Lewis*, 19 How. (U. S.) 280, a case very closely analogous to that of the *Bowling Green Savings Bank*, the attorney had obtained a judgment of foreclosure, but the money due was paid into court without sale. Upon the attorney's claim

of a general lien for other services, and an order for payment thereof out of the fund by the court below, the supreme court reversed the order and directed the fund to be paid to the complainants.

In a recent case (*In re Knapp*, 85 N. Y. 284) *Danforth, J.*, says: "The lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it," (71 N. Y. 443;) thus reaffirming the only ground upon which this lien has ever been put, and which, while it explains the reason for the lien, also necessarily limits it to the services and charges in the same action. In the case last cited the same eminent justice adds: "No new rule was enunciated in *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where it was said that the lien of the attorney attaches to the money recovered or collected upon the judgment."

As the prior rule was undoubted that the lien upon the judgment did not extend beyond the costs and compensation in the cause, or in the same subject-matter, and as no new rule was intended to be enunciated in the *Case of the Bowling Green Savings Bank*, it must be understood that the court of appeals did not intend in that case to overrule so many express adjudications that where the moneys have not been reduced to the attorney's actual possession, his lien upon the judgment does not extend beyond the amount of compensation due to him in the particular cause, or in the same subject-matter. *In re Paschal*, 10 Wall. 496; *The General Share T. Co. v. Chapman*, L. R. 1 C. P. Div. 771.

In the present case the petitioner never came into possession of the moneys claimed; they were procured by the services of other attorneys, by legal proceedings subsequent to the date of the petitioner's claim. These subsequent services were necessary to realize anything upon the judgment, and the subsequent attorneys have their own lien upon the judgment and its proceeds for their subsequent services in the cause; and, upon the doctrine contended for by the petitioner, they might have a conflicting lien for their own general balance, to the full amount collected, if their bill amounted to so much. Were the doctrine to be recognized that attorneys have a general lien for all their professional services upon each and every uncollected judgment which they might have obtained in behalf of a client, through an indefinite period, very great confusion and inconvenience would be the necessary result. The petitioner's general bill, in this case, exceeded each of the judgments against James Wilson. If one of them only had been collected by the subsequent

attorneys, the prior equitable assignment to the petitioner, upon the doctrine contended for, would either have entitled him to the entire proceeds, to the exclusion of the subsequent attorneys who might have had greater equitable claims for their services in obtaining the money upon the judgment, or else would compel a further judicial hearing and determination, as between the former and subsequent attorneys, as to the apportionment of the proceeds between them.

The bill of services which the petitioner now seeks to charge upon the two earlier judgments is, moreover, a bill for obtaining judgment against Hine and Phillips, some four months afterwards. How much, if any, of this bill existed in January, 1879, when the judgments against Wilson were recovered, does not appear; and, by the rule that formerly existed, the attorney had no lien, except upon papers in his hands, until judgment, or, at least, till a verdict. *Sweet v. Bartlett*, 4 Sandf. 661; *McCabe v. Fogg*, 60 How. Pr. 488. This latter bill, as it now stands, could not, therefore, have been a lien upon the prior Wilson judgments when they were entered; and if not a lien then, how could it become so afterwards? Neither principle nor authority can sanction an increase in the amount of a lien upon an uncollected judgment through subsequent services in independent matters. Section 66 of the new Code of Procedure, 1879, which gives an attorney "a lien upon his client's cause of action" from its commencement, refers, I think, to his services and charges in the cause itself, and no more, and does not affect the questions here considered.

The petitioner's claim to a lien upon the judgments against Wilson must therefore be disallowed.

Upon the pending suits, transferred by the petitioner under the agreement, the assignee has collected \$144.57. The petitioner had a lien upon these suits and on the papers therein for his general bill, which the agreement has preserved. Those papers were essential to the further prosecution of these suits, and to the recovery of the moneys afterwards collected therein. Upon the authorities above cited (*In re Paschal*, 10 Wall. 483; *In re Broomhead*, 5 Dowl. & L. 52, etc., *supra*) the court would not have ordered those papers to be transferred by the petitioner except upon payment of his general bill, or some security analogous to that of the agreement made. *Carver's Case*, 7 Nott. & H. 499; *Heslop v. Metcalfe*, 3 Myl. & C. 183; *Cane v. Martin*, 2 Beav. 584; *The Hektograph Co. v. Fowrl*, 11 FED. REP. 844. By that agreement this lien must be paid "out of the first mon-

neys collected from those suits." I find a balance of \$74.55 collected upon these suits not applied to the petitioner's benefit, and he is, therefore, entitled to that amount.

The substitution of attorneys upon the Wilson executions, and the surrender of the notes upon which those judgments were founded, were not necessary, and were of no value in the subsequent collection of those judgments; they were not even clearly embraced in the terms of the agreement between the parties; and, as they were of no beneficial use, the surrender of them cannot now serve as a basis for any claim to a general lien upon the Wilson judgments which did not previously exist.

In *Hodgins v. Kelly*, 1 Hogan, 388, the court say: "The general lien exists as to the papers and deeds in his [the attorney's] hands, but cannot be extended to the funds in the cause if the plaintiff can obtain payment without his assistance or the use of those papers."

The petitioner may have an order for the payment of \$74.55, and his disbursements in this proceeding.

UNITED STATES v. THOMSON.

(District Court, D. Oregon. May 23, 1882.)

1. TAKING PASSENGERS ON BOARD.

Passengers who go on board a vessel openly and in the usual way are presumed to have been taken on board by the master, within the purview of sections 4252-3 of the Revised Statutes.

2. INTENT TO COMMIT CRIME.

Neglect in the discharge of a duty or indifference to consequences is in many cases equivalent to a specific criminal intent

3. CASE IN JUDGMENT.

The defendant, being the master of a vessel under charter at the port of Hong Kong to carry passengers to Portland, Oregon, permitted the charterers to load her, under the inspection of the port officers, without himself knowing or taking any steps to know how many passengers were on board; and upon arrival in Oregon it was found that there were 160 passengers in excess of the number allowed to be carried by sections 4252-3 of the Revised Statutes. *Held*, that it was the duty of the defendant to have taken steps before leaving the port to ascertain how many passengers he had on board, and that the omission of this duty was such negligence on his part as made him guilty of a violation of the statute.

Information for Violation of section 4253 of the Revised Statutes.

J. F. Watson, for plaintiff.

John W. Whalley, for defendant.

DEADY, D. J. Section 4253 of the Revised Statutes provides that if "the master" of any vessel at a foreign port, not contiguous to the territory of the United States, "shall take on board such vessel" "any greater number of passengers" in proportion to the space allowed them thereon than is prescribed by section 4252 of the Revised Statutes, "with intent to bring such passengers to the United States," and does bring the same within the jurisdiction of the United States, "he shall be deemed guilty of a misdemeanor," and fined \$50 for every such passenger, and may also be imprisoned not exceeding six months. The defendant, as the master of the English steam-ship *Bothwell Castle*, is accused by the information herein of violating this statute, by taking on board said vessel on April 21, 1882, at the port of Hong Kong, 160 passengers more than the number allowed thereby to be carried thereon, with intent to bring the same to the United States, and by afterwards bringing said passengers on said vessel within the jurisdiction of the United States, to-wit, the district of Oregon. The defendant pleaded not guilty to the charge, and by the stipulation of the parties the case was tried by the court without a jury. From the evidence, including the testimony of the master, his chief officer, and two of the seamen, it appears—

That within a year past the defendant carried a cargo of Chinese passengers on this vessel from Hong Kong to San Francisco, consisting of 1,033 adults; that on April 18, 1882, the "administrator" of the port of Hong Kong licensed the *Bothwell Castle* to carry, under the English passenger act, not exceeding 1,094 Chinese passengers from that port to Portland, Oregon; that on April 20th, the "emigration officer" of the same port gave the vessel a "certificate," to the effect that she had space and was furnished to carry 1,094 adult passengers on said voyage, and that there was then on board 1,032 men and 20 children, equal to 1,042 adults; that on the same day the "harbor master" gave the vessel a "clearance" for Portland, with 1,052 Chinese passengers in the lower berths, "under the emigration officer's certificate;" that a passenger list attached to said documents and signed "George Holmes, passenger broker," and containing the names of 1,015 ordinary passengers, and 37 doctors, interpreters, stewards, cooks, etc., or in all 1,052 passengers, was delivered by the defendant on May 14, 1882, to the collector at Astoria, verified by his oath then made as containing "the names and descriptions of all the passengers who were on board the said steamer (*Bothwell Castle*) at the time of or since her last departure from the said port of Hong Kong;" that said vessel on said voyage was chartered to carry Chinese passengers to Portland, and while lying in the stream at Hong Kong, not less than a mile from the shore, on April 20, 1882, took on board 1,198 of such passengers, of whom about 1,041 had

"contract passage" tickets, containing the terms of the contract, a receipt for \$50 in payment of the passage, with the name of the passenger, his sex, age, occupation, and place of birth, signed by "George Holmes, passenger broker," and signed and certified by the "emigration officer," to the effect that he had "explained and registered" the same, and about 157 had similar tickets not signed by any one, and brought the same to this port, when by law she was not entitled to carry more than 1,038 such passengers, being an excess of 160; that after all said passengers were on board said vessel there was a count of the same made by the "harbor master" and "assistant health officer" of the port, on said April 20th, and the defendant, upon a statement then given him by them, and by him delivered to the proper local authorities, obtained his clearance and gave bond to convey the passengers as per agreement, and at 6 o'clock the next morning sailed for Portland; that soon after starting a strict search was made for stow-aways, or persons who had not paid, and one found and put off the vessel, but no attempt was ever made by the master, or any one under his direction or authority, to count the passengers or ascertain how many were on board until the vessel was within two or three days of the mouth of the Columbia river, when the defendant ordered the tickets taken up, and found that he had about 160 passengers more than he was entitled to carry; that on April 19th, the "government marine surveyor" measured the vessel, according to the American law as furnished him by the American consul, and furnished the defendant with a written report thereof, from which it appears that she was not entitled to carry more than 1,005 passengers, but upon a survey made by the collector at Astoria, it was ascertained that she had space enough for 1,038.

The defendant denied in his testimony all knowledge of the excess of passengers, or of his liability therefor under the United States statute, and said that he paid no attention to the matter, and supposed that the port officers would duly attend to it and not allow him to sail with more passengers than there was on his list; and when the collector at Astoria ascertained that there was an excess of passengers on board by counting them, and asked the defendant how it came that there were 160 too many, the defendant said he did not know; that it was not a matter that he was bound to look after—he went by the list; that the company had sold 3,000 tickets and he supposed they were short of ships.

There is no conflict in the evidence, and assuming that the facts are substantially as stated, counsel for the defendant insists that he cannot be found guilty because there is no evidence of a specific criminal intent; that as he did not know he had taken on more passengers than the law allowed he cannot be held to have taken on the excess with the "intent" to bring them to the United States.

And, first, what constitutes a taking on board within the meaning of the statute? I suppose that all passengers who go on board openly in the usual way—not clandestinely and without the master's consent, expressed or implied—are taken on board by him. It is not necessary that he should see them come. He may, and usually does, commit that duty to his subordinates. But as no one has a right to come on board without his consent, a passenger found there is presumed to have been taken on board by him until the contrary appears.

There was a suggestion in the argument that the excess of 160 might have gotten on board surreptitiously after the count by the port officers, during the afternoon and night of April 20th, by climbing up the ship's sides. But that was impossible, unless with the connivance of the officers and crew. And the proof is that a strict watch was kept on board during that time, and that only one little boat approached the vessel and it was sent away.

It must be assumed, then, that all the passengers on the vessel came on with the implied consent of the master. He took no steps to prevent any of them coming on board; gave no directions to his officers to allow only so many passengers to come on board; and therefore, in contemplation of law, they were taken on by him.

But, nevertheless, if there must have been a positive or specific "intent," in the mind of the defendant, to take on this 160 passengers for the purpose of bringing them to the United States in the same way that a specific criminal intent is necessary to constitute larceny, then the prosecution must fail; for, whatever the fact may be, no such intent has been shown.

But in many cases negligence or indifference to duty or consequences is equivalent to a criminal intent. 1 Bish. Crim. L. § 62; 1 Whart. Crim. L. §§ 89, 125.

Under the circumstances, the statute forbid the defendant from taking on board any of these 160 passengers; and he could not knowingly have done so without intending to violate the statute. What was his duty, then? To leave the matter in the hands of his charterer and their broker, who were only interested in getting as many passengers on board as possible, and the port officers, who were under no obligations to prevent a violation of a United States statute, but only concerned to see that the regulations of the port were complied with? I think not. In my judgment it was the duty of the

master, before leaving the port of Hong Kong, to have taken steps to ascertain how many passengers he had on board, if he had not taken an account of them as they came on, as he should have done. This duty should have been performed in person, or by his officers under his direction. The omission of it was an act of gross negligence, in consequence of which this 160 passengers were unlawfully brought to the United States, which consequence he must be held to have intended.

Any other construction of the statute would make it a dead letter. Neither ship nor owners are responsible for its violation, as they ought to be, and the master can always be kept in convenient ignorance of the facts until the vessel has sailed from port, and then it is too late for him to commit the crime of taking them on board with a specific intent to bring them to the United States.

There are also some circumstances in the case which tend to show that the defendant was not altogether innocently ignorant in this matter. When off the mouth of the Columbia river he found out that he had a large excess of passengers on board. It would have been natural for an innocent man to have reported that fact to the collector when delivering his list of passengers. Still he might not, and the master says he did not, because he was not interrogated about it. But how could an honest, truthful man, not only suppress this fact of the excess, but also declare on oath that the passenger list contained the names of all the passengers on board, when he absolutely knew that it did not, by a large number. But as to a portion of this excess the evidence is satisfactory that the master knew he had them on board, and therefore must have taken them on with a specific intent to violate the statute. He says that he knew, or supposed, he had 1,052 passengers on board—the number contained in the list furnished by the passenger broker. But the survey of his vessel, made by the surveyor of the port under the American law, on April 19th, a written report of which was furnished the defendant and brought by him to this port, shows that the vessel was only entitled to carry 1,005 passengers, or 48 less than the list. This was the knowledge which the defendant had when he took these 48 passengers on board and left with them for this port. The only reasonable inference from the premises is that he took them on with the intent which constitutes the violation of the act, if followed up by bringing them here. True, the measurement of the vessel by the col-

lector at Astoria shows that she has space for 1038 passengers. But that is the defendant's good fortune rather than the result of his good conduct. He did not act upon that impression. And still there are 15 passengers on the list in excess of what the vessel was entitled to carry by the Astoria measurement, of which the defendant must have had knowledge.

The finding of the court is that the defendant is guilty as charged in the information.

UNITED STATES *v.* THOMSON.

Information for Violation of section 4266 of the Revised Statutes.

The defendant was also charged with the violation of section 4266 of the Revised Statutes, by failing to deliver a correct list of his passengers on board to the collector at Astoria. The case was submitted to the court on the evidence in the above case, and the court found him guilty and sentenced him to pay the fine prescribed by statute—\$1,000.

CASTRO *v.* DE URIARTE.

(*District Court, S. D. New York. March 25, 1882.*)

1. FALSE IMPRISONMENT—WHEN ACTION LIES.

Where the subject-matter of an offence charged on the accused is wholly beyond the jurisdiction of the committing magistrate, only an action for false imprisonment, and not an action for malicious prosecution, will lie.

2. MALICIOUS PROSECUTION—ACTION FOR.

But if the subject-matter and the person be within the proper jurisdiction of the magistrate, and the papers upon which the process was issued, or the process itself, be defective or irregular merely, upon the proceeding being terminated, if the prosecution was malicious, the accused may maintain an action either for false imprisonment or for malicious prosecution. Although the magistrate who issues process without jurisdiction is liable in trespass only, the complainant is liable to trespass on the case as the indirect cause of the injury.

3. COMPLAINT CHARGING BOTH OFFENCES—JOINDER.

In an action brought by a person who had been arrested for the purpose of extradition, under the treaty with Spain, upon the complaint of the defendant, the Spanish consul, and the complaint in the present action charged in the first count false imprisonment, upon the ground of defects in the affidavits submitted to the United States commissioner, upon whose order the arrest was

made, and in the second count alleged a malicious prosecution, *held*, on demurrer, that as the commissioner had full jurisdiction of the subject-matter the two counts were not necessarily "inconsistent," and therefore not, on that ground, improperly united in the complaint under sections 484 and 488 of the New York Code of Procedure.

4. SAME—SEPARATE OFFENCES IN SEPARATE COUNTS.

Different counts are presumptively upon different claims, or for different offences. It cannot, therefore, be assumed upon demurrer, however probable it may be, that the counts for malicious prosecution and for false imprisonment are upon the same identical proceeding.

Demurrer to Amended Complaint.

Carpenter & Mosher, for plaintiff.

Sidney Webster, for defendant.

BROWN, D. J. This is an action against the defendant, the consul general of Spain, to recover damages for an alleged false imprisonment and malicious prosecution in proceedings for the extradition of the plaintiff, under the treaty with Spain of January 5, 1877. 19 St. at Large, 650. Being a common-law action, the sufficiency of the pleadings upon the demurrer is to be determined according to the New York Code of Procedure. Rev. St. § 914.

The amended complaint contains two counts or causes of action separately stated. The first charges that the defendant, on the second of October, 1881, appeared before John A. Osborn, a commissioner of the circuit court of the United States for the southern district of New York, and charged the plaintiff with forgery at Havana, Cuba, on or about September 25, 1881, and thereupon procured the commissioner's warrant for the arrest of the plaintiff, upon which he was taken before the commissioner by the active procurement and aid of the defendant, and for several days restrained of his liberty; that at the time of issuing said warrant, and of the arrest of the plaintiff thereunder, the commissioner had in fact no jurisdiction, and the warrant was wholly void for various reasons, stating, among others, that no mandate or preliminary warrant had been obtained from the executive department prior to the proceedings before the commissioner, (*In re Kaine*, 3 Blatchf. 6-10; *In re Thomas*, 12 Blatchf. 370; *In re Stupp*, Id. 501;) and that the warrant itself, for various defects upon its face, was wholly void. The second cause of action alleges the arrest of the plaintiff upon a warrant issued by the same commissioner upon the same day on a similar charge of forgery, under which, by defendant's procurement, he was imprisoned on the

second day of October, and restrained of his liberty until October 4, 1881, when, after examination, the plaintiff was held not guilty, and discharged and fully acquitted by the commissioner; and that the said proceedings have been fully ended and determined; that all the acts and doings of the defendant were done falsely and maliciously, and without reasonable and probable cause, and claims as damages \$10,000.

The defendant demurs to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action. He also demurs to the whole complaint on the ground that it appears on the face thereof that the first and second causes of action are improperly united; the first cause of action being for false imprisonment, and the second for malicious prosecution founded on the same alleged acts and supposed wrongs.

Section 488 of the Code of Procedure specifies eight causes for which the defendant may demur to a complaint. Subdivision 7 is "where causes of action have been improperly united." Subdivision 8 is "where the complaint does not state facts sufficient to constitute a cause of action." By section 492 the defendant may demur to the whole complaint, or to one or more separate causes of action stated therein.

Section 484 specifies the causes of action which may be joined in one complaint, and subdivision 2 embraces causes of action "for personal injuries, except libel," etc.; and both of the causes of action in the present complaint clearly come under this subdivision. This section also provides, at its close, that "it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section, and *that they are consistent with each other.*" The last clause, requiring that such causes of action be consistent with each other, was first added in the new Code of 1877.

The demurrer to the second cause of action, on the ground that it did not state facts sufficient to constitute a cause of action, is based upon the contention of the defendant that an action for malicious prosecution cannot be maintained except upon a legal and *valid* judicial proceeding; that it will not lie upon proceedings void for want of jurisdiction; that the complaint must allege or show such a valid judicial proceeding; and that the second cause of action is in this respect defective in not alleging either in general words that the

commissioner had jurisdiction, or in showing any facts sufficient to authorize the issuing of the warrant of arrest.

The demurrer to the whole complaint for the improper joinder of the two causes of action is based upon the contention that an action for false imprisonment and for malicious prosecution cannot both be maintained upon the same identical proceedings and arrest; that the former is based upon a want of jurisdiction, and the latter upon a valid legal proceeding; and that if the statement of the second cause of action be held sufficient in averring or showing jurisdiction in the commissioner who issued the warrant for the arrest, then it is *inconsistent* with the first cause of action, which is based expressly upon the want of jurisdiction, and therefore that the joinder of these two causes of action in one complaint is forbidden by section 484, above referred to.

The remedy at common law for false imprisonment is by an action of *trespass* for a *direct* injury to the plaintiff through an unlawful arrest, or a detention without legal authority. The arrest or detention may be by process, under color of legal proceedings, or without process, in the absence of any legal proceedings; or it may be through the irregular issuing or service of process in proceedings otherwise valid. Addison, Torts, §§ 798, 802, 803, 831; *Barker v. Braham*, 2 W. Bl. 865, 844; *Holley v. Mix*, 3 Wend. 350; *Pease v. Burt*, 3 Day, 485.

The common-law remedy for a malicious prosecution, on the other hand, is by an action on the *case* for an *indirect* injury through the institution of legal proceedings from malicious motives and without probable cause. To recover in such an action not only must malice and the absence of probable cause be shown, but also the termination of the legal proceedings in favor of the accused; none of which are essential to recovery in an action of trespass for false imprisonment. The gist of the action is the malice and want of probable cause; and where these concur and the accused has been acquitted, the law, by means of this remedy, designs to afford him compensation for the injury, expense, annoyance, or disgrace of the groundless proceedings against him. Addison, Torts, §§ 852, 868.

Where the proceedings are void for want of jurisdiction, trespass for false imprisonment is the ordinary remedy, since no other proof is requisite than the proof of the arrest or detention, and of the illegality of the proceedings. Upon this proof the plaintiff is entitled to compensatory damages. *Jay v. Almy*, 1 W. & M. 262; *Blythe v.*

Tompkins, 2 Abb. Pr. 468. And where there is also evidence of malice or bad faith or want of probable cause, exemplary damages may also be given, but not otherwise. Addison, Torts, § 845; *Day v. Woodworth*, 13 How. 363, 371; *Brown v. Chadsey*, 39 Barb. 253, 265; *Williams v. Garrett*, 12 How. (N. Y.) 456.

Where the arrest complained of arose in the course of legal proceedings, and there was no doubt of malice and of the want of probable cause, and no question existed concerning the jurisdiction or legal validity of the proceedings themselves, the pleader was necessarily confined to an action on the case for malicious prosecution; while if a doubt existed with regard to the jurisdiction of the court or magistrate in issuing the warrant of arrest, or the regularity of the proceedings under it, the pleader would ordinarily insert also a count of trespass for false imprisonment, so that, upon trial, if the proceedings were held irregular he would be entitled to recover compensatory damages at all events, and on proof of malice and want of probable cause he could recover full damages for the malicious prosecution, in case the proceedings and the arrest should be held to be regular, and within the jurisdiction of the court or magistrate that issued the warrant.

While thus, from reasons of convenience, the remedy for an arrest without jurisdiction was ordinarily by an action of trespass for false imprisonment, and the remedy was by an action on the case for malicious prosecution, where the arrest was in the course of lawful prosecution, yet these remedies were not confined within these several limitations, nor were they always mutually exclusive of each other. Though the process and proceedings were perfectly valid and regular, yet in case of their abuse or misuse or service at an unlawful time, an action for false imprisonment would still lie. *Holley v. Mix*, 3 Wend. 350; *Doyle v. Russell*, 30 Barb. 300, 305; 1 Term, 536-7; *Pease v. Burt*, 3 Day, 485.

By the Revised Statutes of this state, (2 Rev. St. p. 553, § 16,) it is provided:

"Where, by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another, for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was wilful or accompanied by force or not; and whether such injury was a direct and immediate consequence from such wrongful act, or whether it was consequential and indirect."

This provision is not affected by the Code of Procedure. The necessary effect of it would seem to be, to authorize an action on the case for a malicious prosecution where malice and the want of probable cause appear, even though the want of jurisdiction in the proceedings for the arrest also expressly appear, since an action of trespass for false imprisonment would in the latter case undoubtedly lie, and in all such cases, therefore, the party injured has his election of remedies under this statute. *Rice v. Platt*, 3 Denio, 81, 84; *Wright v. Wilcox*, 19 Wend, 343, 348; *Shorte v. Charles*, 18 Wend. 616.

Aside from this statutory provision, upon an examination of the authorities cited in the elaborate briefs which have been submitted to me by the counsel of the respective parties, I am satisfied that the great preponderance of authority, not only in this state but in this country generally, as well as in England, is to the effect that an action for malicious prosecution will lie against the person upon whose complaint the warrant was issued, though the proceedings were irregular and without jurisdiction, provided the subject-matter, the offence, and the person were within the magistrate's jurisdiction. It is so stated expressly in the text writers, and has been repeatedly adjudged. 3 Bl. Comm. 127; 2 Greenl. Ev. § 449; 1 Chit. Pl. *133.

The precise question here presented arose in the case of *Morris v. Scott*, in this state, (21 Wend. 281,) where, in an action on the case for malicious prosecution, the plaintiff was nonsuited on the trial because it did not appear in the declaration that the justice before whom the complaint was made, and who had issued his warrant for the arrest of the plaintiff, had jurisdiction in the matters charged. Upon error to the supreme court the judgment was reversed, the court holding that an action might be maintained "though there may be a total want of jurisdiction, provided malice and falsehood be put forward as the *gravamen*, and the arrest or other act of trespass be claimed as the consequence." The authority of this case has not been shaken, but reaffirmed, by subsequent decisions. *Newfield v. Copperman*, 47 How. 87; *Thaule v. Krekeler*, 81 N. Y. 428; *Van Latham v. Libby*, 38 Barb. 348; *Dennis v. Ryan*, 63 Barb. 145; 65 N. Y. 385. In the case last cited the defendant had been charged with forgery, accompanied by a statement of such facts and circumstances as showed that the offence was not forgery in law, and upon trial of the indictment he was acquitted upon that ground. In a subsequent trial for malicious prosecution the judge charged that the action would lie

"if the defendant knew that the charge was false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial even though the charge made did not constitute the crime alleged, or any crime;" and this charge was sustained on appeal.

The same principle has been affirmed in numerous other cases in this country. *Stone v. Stevens*, 12 Conn. 219; *Hayes v. Younglove*, 7 B. Mon. 545; *Stancliffe v. Palmeto*, 18 Ind. 321; *Stocking v. Howard*, (Miss.) 24 Alb. Law J. 537; *Sweet v. Negus*, 30 Mich. 406; *Collins v. Love*, 7 Blackf. 416; *Forrest v. Collier*, 20 Ala. 175; *Brewboy v. Cockfield*, 2 McMullen, 270; *Gibbs v. Ames*, 119 Mass. 60.

In support of the proposition that an action for malicious prosecution will not lie except upon *valid* legal proceedings, the defendant relies upon the recent case of *Nebenzahl v. Townsend*, decided in the New York common pleas, (61 How. N. Y. 353,) on several cases in Massachusetts, (*Bixby v. Brundridge*, 2 Gray, 129; *Whiting v. Johnson*, 6 Gray, 246; *Bodwell v. Osgood*, 3 Pick. 379, 383,) and on some others of a similar character. In the case in the common pleas the point was referred to briefly; but at the close of the paragraph the learned judge says: "The point is not material, from what subsequently occurred." The case has not, therefore, the weight of an express adjudication. In *Bixby v. Brundridge* the decision was upon the express ground that the justice had "no jurisdiction of the offence," and the fact was the same in both the other Massachusetts cases. These cases, therefore, are not in point as respects a court or magistrate that has jurisdiction of the subject-matter of the offence charged and of the parties. The same distinction was taken in the case of *Painter v. Ives*, 4 Neb. 126, and in *Sweet v. Negus*, 30 Mich. 406. In the former case, *Lake*, C. J., says:

"This seems to be the correct rule where the proceedings complained of were had in a court having no jurisdiction of the subject-matter of the suit."

In the latter case *Christiancy*, J., says:

"There may be good ground for holding, as has been held in some cases, that when the justice has by law no jurisdiction of the subject-matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings cannot properly be called a prosecution. In such cases the accused would be under no obligation to obey or submit to the arrest, or the trial or examination. We decide nothing upon this point, as it is not before us; but we are entirely satisfied that when the want of jurisdiction does not appear upon the face of the warrant, and is only to be shown by evidence

abunde, the party arrested and prosecuted may, when he has been acquitted, maintain an action for malicious prosecution, when he shows it to have been malicious, and the prosecution does not show in defence that there was probable cause, and that he acted in good faith."

In Massachusetts, also, in the more recent case of *Gibbs v. Ames*, 119 Mass. 60, the decision of the court is to the same effect, where a plaintiff was brought to trial and acquitted, but without any previous proper complaint or proper warrant of arrest, and it was held that an action for malicious prosecution would lie; and the court say:

"This was a sufficient prosecution and acquittal therefrom to furnish a foundation for the common action for malicious prosecution, notwithstanding any insufficiency of the complaint, or defect of process by which she was brought before the court, or *want of jurisdiction* of the magistrate arising from such defect. *The magistrate had jurisdiction of the subject-matter of the complaint*, which was not the case in *Blaxby v. Brundridge*, 2 Gray, 129, and *Whiting v. Johnson*, 6 Gray, 246."

In England it can hardly be said that any other rule has ever prevailed as against a prosecutor who has maliciously procured an illegal warrant of arrest to be issued upon a groundless charge, although the magistrate who maliciously issues it without jurisdiction is liable in trespass only, since he is the *direct* cause of the arrest, (*Morgan v. Hughes*, 2 Term, 225, 221,) while the complainant was but the *indirect* cause.

Blackstone (3 Comm. 127) says:

"But an action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense upon which this action is founded." *Gastin v. Willcock*, 2 Wilson, 302, 307; *West v. Smallwood*, 3 Mees. & W. 418, 420; *Wicks v. Tentham*, 4 Term, 247; *Pippet v. Hearn*, 5 Barn & A. 634.

In the late case of *Farley v. Danks* (4 El. & Bl. 490) the defendant had falsely and maliciously procured the plaintiff to be adjudicated a bankrupt upon an affidavit which was not sufficient legally to warrant an adjudication. Lord Campbell, in support of a verdict, says:

"It is said that the adjudication ought to be a consequence necessarily and legally following from the facts if true. But all that is necessary is that the defendant should falsely and maliciously cause the act; and he does that when he swears falsely, and the act would not be done without his so swearing.

It would be monstrous to say that this does not make out the charge. I should be very sorry to find any decisions of our courts to that effect. Where a man makes a true statement of fact, upon which the court acts wrongfully, the grievance, it is true, arises not from the statement, but from the judgment; but it would be monstrous to hold that this is so where the statement is maliciously false. We must assume that *Oldfield v. Dodd*, 8 Exch. 578, is correctly decided; though for anything I know it may be reversed in the house of lords. But it does not show that this action will not lie; it shows only that the commissioner made a mistake; he did not the less act on the authority of the defendant. Suppose an application to be made to hold a man to bail upon affidavit that he is going to leave the country, which is utterly without foundation of fact, and that some slip is made, as Mr. Gray suggests, in point of law; it is clear that, under these circumstances, a party would be liable for a malicious falsehood. The action, therefore, well lies; and the rule must be discharged."

Upon these authorities it would seem to be clear that, whatever doubt may exist in regard to the propriety of an action for malicious prosecution where the court or magistrate issuing the warrant was wholly without jurisdiction of the subject-matter or of the offence charged, the nearly unanimous decisions of the courts are that such an action will lie against the prosecutor who has maliciously set on foot legal proceedings, though invalid, before a tribunal of competent jurisdiction; and such is this case. The defendant, according to the averments of the second cause of action demurred to, maliciously and without probable cause procured the plaintiff's arrest upon a charge of forgery, through a warrant which he procured to be issued from a commissioner of the circuit court of this district. The magistrate was competent to entertain the charge; the offence was within the provisions of the treaty. The proceedings may have been irregular and invalid, but they were within the general scope of his jurisdiction; and these proceedings having been, according to the complaint, set on foot maliciously and without probable cause, and the plaintiff's arrest procured through the defendant's agency therein, it does not lie in his mouth to insist that the proceedings were defective.

The demurrer to the second cause of action should therefore be overruled.

In the above view of the second cause of action it is not necessarily "inconsistent" with the action of trespass for false imprisonment stated in the first cause of action; inasmuch as, if the proceed-

ings on the warrant for the arrest should be found to be irregular and void, either action would in this case lie, by reason of the general jurisdiction of the commissioner over the subject-matter; and this would be the case although it appeared that both causes of action were upon one and the same proceeding and arrest. *Barr v. Shaw*, 10 Hun. 580. But this fact does not appear upon the complaint in this case, however probable it may be. In the theory of pleading different counts are supposed to represent different claims or offences. It is not impossible that the plaintiff may have been arrested by the defendant's procurement upon the same day upon two different charges, and by two different warrants of arrest, and the subsequent proceedings might possibly have been had under both. It is not impossible that a prior proceeding may have been thought of doubtful sufficiency, and a second have followed upon the same day, designed to avoid any defects of the first. Nothing in the complaint shows that both counts are for the same arrest, and it cannot upon demurrer be taken for granted.

On both grounds, therefore, the demurrer to the whole complaint should be overruled.

The defendant may answer within 20 days on payment of the costs of the demurrer.

NOTE.

CONFORMITY TO PRACTICE IN STATE COURTS. United States courts conform as near as may be to the practice, pleading, and modes of procedure in civil cases other than equity and admiralty, with the rules of practice of the states where they are held. (a) Section 914 of the Revised Statutes only assimilates the practice in the federal courts to that of the state courts "as near as may be," (b) and goes no further than to adopt the state statutes "as near as may be." (c) The statute makes a distinction between common-law cases and equity and admiralty cases as to the forms and modes of procedure, (d) and it applies solely to common-law suits, (e) and has no application to cases in equity. (f) So, the practice of allowing ejectments to be maintained on equitable titles cannot affect the jurisdiction of the courts of the United States, (g) and so of answers to an action at common law, claiming an equitable

(a) *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. Rep. 478.

(b) *Whalen v. Sheridan*, 10 Fed. Rep. 662; *Robinson v. Mut. Ben. Ins. Co.* 16 Blatchf. 201. See *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291.

(c) *U. S. v. Brawner*, 7 Fed. Rep. 90.

(d) *Steam Stone Cutter Co. v. Sears*, 9 Fed. Rep. 9; *Sandford v. Portsmouth*, 6 Cent. L. J. 147; *Nudd v. Burrows*, 91 U. S. 426.

(e) *The Blanche Page*, 16 Blatchf. 5; *Dwight v. Merritt*, 18 Blatchf. 305.

(f) *Blease v. Garlington*, 92 U. S. 1; *Brooks v. Vermont C. R. Co.* 14 Blatchf. 471. See *Butler v. Young*, 5 Chi. Leg. News, 146.

(g) *Fenn v. Holme*, 21 How. 431; *Hooper v. Schelmer*, 23 How. 249; *Sheirburn v. Cordova*, 24 How. 423; *Robinson v. Campbell*, 3 Wheat. 212.

right.(h) When pending cases are proceedings at law, they are entitled to the benefits of the provisions of this section;(i) and the first inquiry is, what is the practice in the state court?(j)

The intention of the statute is to secure in each state one method of procedure in all common-law cases, and to attain that result by adopting in general the procedure of the state courts.(k) Under this statute old forms of process for the commencement of common-law suits used in the United States courts have been superseded by the summons, conforming to the practices of the state courts except as to the mode of attestation, which is provided for by Rev. St. § 911.(l) It applies to process by which suits are brought, and its mode of service;(m) so of *mandamus* as a remedy to compel municipal corporations to levy a tax to pay a judgment creditor;(n) but not to summary process against a marshal, where the state law authorizes such process against a sheriff for a penalty in addition to the amount due on the execution.(o)

This section applies to the rules of pleading;(p) and to the time of filing the declaration after being returned "summoned."(q) It applies to the mode of amending the complaint as of course,(r) and pleadings not authorized in the state court in a like suit will be set aside on motion.(s) On removal of the cause no other or different pleadings are necessary;(t) but it does not apply to the rule of set-off, which is exclusively under the laws of the United States;(u) nor to the signature to a bill, which is regulated by rule 34 in equity.(v) Where a state abolishes fictitious proceedings and establishes in their place the action of trespass, for the purpose of trying the title to lands and recovery of their possession, this section applies.(w) It applies to the requirement to answer interrogatories as a substitute for a bill of discovery;(x) and to ordering a proceeding to substitute one defendant for another;(y) and to all motions at common law required by the practice at a special term of the state court, in a stated term of the federal court;(z) but it does not apply to ordering a peremptory nonsuit against the will of the plaintiff.(a) It applies to notice of hearing for the trial of an issue of law on a demurrer.(b) State laws requiring a judge to put his decision in writing are not binding on federal courts.(c)

(h) *Montejo v. Owen*, 14 Blatchf. 324.

(i) *Moran v. City of Elizabeth*, 9 Fed. Rep. 73.

(j) *Brown v. Phil., W. & B. R. Co.* 9 Fed. Rep. 185.

(k) *Bills v. N. O., St. L., etc. R. Co.* 13 Blatchf. 223.

(l) *Brown v. Pond*, 5 Fed. Rep. 37; *Peaslee v. Haberstro*, 15 Blatchf. 472; *Dwight v. Merritt*, 13 Blatchf. 305; *S. C.* 4 Fed. Rep. 614.

(m) *Brownell v. Troy & Bost. R. Co.* 18 Blatchf. 245; *Dwight v. Merritt*, 13 Blatchf. 305; *Springer v. Foster*, 2 Story, 383; *Perkins v. Watertown*, 5 Biss. 320.

(n) *U. S. v. City of Keokuk*, 6 Wall. 514. See *Wisdom v. Memphis*, 8 Cent. L. J. 108.

(o) *Gwin v. Barton*, 6 How. 7; *Gwin v. Breedlove*, 2 How. 29.

(p) *Oscanyan v. Winchester Arms Co.* 15 Blatchf. 87; *Taylor v. Brigham*, 3 Woods, 377; *Lewis v. Gould*, 13 Blatchf. 216.

(q) *Ricard v. Inhab. of New Providence*, 5 Fed. Rep. 434.

(r) *Rosenbach v. Dreyfuss*, 1 Fed. Rep. 393; *West v. Smith*, 101 U. S. 263; *Whitaker v. Pope*, 2 Woods, 463.

(s) *Lewis v. Gould*, 13 Blatchf. 216.

(t) *Merch. & Manuf. Nat. Bank v. Wheeler*, 13 Blatchf. 218.

(u) *U. S. v. Robeson*, 9 Pet. 319.

(v) *Stinson v. Haldrup*, 8 Biss. 376.

(w) *Sears v. Eastburn*, 10 How. 187.

(x) *Bryant v. Leyland*, 6 Fed. Rep. 126.

(y) *Harris v. Hess*, 10 Fed. Rep. 263.

(z) *Emma Silv. M. Co. v. Park*, 14 Blatchf. 411; *Nairo v. Cragin*, 3 Dill. 474; *Republic Ins. Co. v. Williams*, 3 Biss. 370.

(a) *Elmore v. Grynes*, 1 Pet. 471.

(b) *Rosenbach v. Dreyfuss*, 2 Fed. Rep. 23.

(c) *Martindale v. Waas*, 11 Fed. Rep. 551.

It is irregular to enter judgment on a referee's report without an application to the court, that being the practice in the state court, (d) and there is no authority to refer a common-law suit to referees for trial without consent of both parties, although the state court may. (e) Does this section authorize the review of an action at law pursuant to the practice of the state court, where the facts were found by a referee, *quare?* (f) The rules of the State Code of Practice have no application over courts of error and bills of exceptions in the United States courts, (g) and there is nothing in this section which extends to or affects the power of the federal courts as it before existed on a writ of error. (h) Judgments and decrees are liens when similar judgments and decrees are made liens by the state law. (i) This section applies to a writ of *scire facias* in reciting a judgment on a prior *scire facias*. (j) State laws regulating final process have no application unless adopted by some act of congress; (k) but state laws as to exemption from levy and sale on execution will be followed; (l) so, as to the notice and mode and time of sale under execution. (m)

Where congress by statute has pointed out a specific course of procedure, or has legislated generally on the subject-matter, such legislation must be followed, although opposed to the forms and modes of procedure prevailing in the state courts and established by the state statutes, (n) and this section does not by implication repeal any previous act of congress expressly providing a particular mode of proceeding. (o) It does not apply to a rule of practice of a state court adopted subsequently to an act of congress regulating the practice in the federal courts in such states. (p)—[ED.]

(d) Fourth Nat. Bank v. Neyhart, 13 Blatchf. 393.

(e) Howe Mach. Co. v. Edwards, 15 Blatchf. 402.

(f) Boogher v. Ins. Co. 103 U. S. 90. See Rob-
inson v. Mut. B. L. Ins. Co. 16 Blatch. 194.

(g) Whalen v. Sheridan, 18 Blatchf. 308, 324;
S. C. 5 Fed. Rep. 436; Marye v. Strouse, 5 Fed.
Rep. 491. See Muller v. Ehlers, 91 U. S. 251.

(h) Town of Lyons v. Lyons Nat. Bank 8 Fed.
Rep. 374. See Nudd v. Burdows, 8 Chi. Leg. News,
129.

(i) Ward v. Chamberlain, 2 Black, 430.

(j) Brown v. Chesapeake & O. C. Co. 4 Fed.
Rep. 771.

(k) Wayman v. Southard, 10 Wheat. 1; Ross v.
Duval, 13 Pet. 45; Boyle v. Zacharie, 6 Pet. 648.

(l) In re Volger, 2 Hughes, 297; In re Appold,
6 Phila. 469; In re Ruth, Id. 438.

(m) Moncure v. Zantz, 11 Wall. 416; Smith v.
Cockrill, 6 Wall. 756; Pollard v. Cocke, 19 Ala.
188; Merchants' Bank v. Evans, 51 Mo. 335. See
Byers v. Fowler, 12 Ark. 218.

(n) McNutt v. Bland, 2 How. 17; U. S. v. Pings,
4 Fed. Rep. 715; Dwight v. Merritt, 4 Fed. Rep.
616; citing Easton v. Hodges, 7 Biss. 324; Beards-
ley v. Littell, 14 Blatchf. 126; U. S. v. Hutton, 25
Int. Rev. Rec. 57.

(o) Wear v. Mayer, 6 Fed. Rep. 660.

(p) Wilcox v. Hunt, 13 Pet. 378.

TIBLIER v. ALFORD.*

(Circuit Court, E. D. Louisiana. May, 1882.)

1. UNLAWFUL ATTACHMENT—MALICE—DAMAGES.

In an action for damages for an unlawful seizure under attachment, if the seizure is proved wrongful, but made in good faith, the jury should find for the plaintiff for actual damages only; but if they should find that the seizure was made in bad faith and maliciously, they might assess proper punitive damages in addition to actual damages proved.

2. PUNITORY DAMAGES.

Punitory damages are not allowed for the purpose of rewarding beyond compensation the injured party, but as a punishment to deter others from like conduct.

3. EVIDENCE AND PRESUMPTION OF MALICE.

A seizure is wrongful if made without proper legal grounds to sustain it, and while malice is to be proved, yet the jury may infer it from evidence satisfying them of the wantonness of the seizure and oppressive conduct on the part of the defendant, taking into consideration all the evidence in the case.

4. GROUNDS FOR ATTACHMENT—REPRESENTATIONS.

If the affidavit for the attachment was based upon representations made by the plaintiff (defendant in attachment) to the defendant, (plaintiff therein,) or to other persons and communicated to him, the jury should find for the defendant; but on this question they cannot consider representations made to other persons and not communicated to the attaching creditor, for such representations could not have influenced his action.

Joseph P. Hornor and Francis W. Baker, for plaintiff.

B. R. Forman, for defendant.

PARDEE, C. J. The plaintiff has recovered a verdict against the defendant for the sum of \$2,500, and interest, amount of damages suffered by the illegal and malicious issue of an attachment. The defendant moves for a new trial on several grounds, mainly:

(1) That the court erred in not charging the jury, as requested by defendant, "that in an action for damages beyond the amount of the bond, for an attachment, the plaintiff must prove malice and want of probable cause." (2) Because, if any such charge, or its equivalent, was given, the jury did not so understand it, or disregarded it. (3) Because the defendant was taken by surprise, while being examined as witness, when he was about to state that the other witnesses, Corbin, Hendricks, and others, had informed him that Tiblier had represented himself to be a resident of Texas, he was interrupted by counsel for plaintiff, and he understood the court to exclude such testimony as hearsay; and he was taken by surprise when the court instructed the jury that the testimony of these witnesses "that Tiblier had represented to them that he was a resident of Texas" must be disregarded, unless it had been communicated to defendant; and thus, through the misap-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

prehension of himself and his counsel as to the ruling of the court, injustice has been done him. (4) Because the verdict of the jury does not fix the time when interest shall begin to run, nor the rate of interest, and no interest is allowed on damages *ex delicto*. (5) And because the damages are grossly excessive, and no actual damages were proven.

The evidence on the trial tended to show that Alford, defendant, a citizen of Kentucky, made a contract with Tiblier, a citizen of Louisiana and dealing in Texas stock, for the sale and delivery of certain mules, at fixed prices. The mules, when tendered, did not fill the contract as to quality, and were rejected by Alford, who thereupon brought suit in the state court for \$1,000 damages against Tiblier for non-compliance with the contract. Without making due inquiry as to the residence of Tiblier, Alford made affidavit in the suit that Tiblier was a non-resident of the state of Louisiana, and made application for a writ of attachment, which was granted on a bond for \$1,000. Under the attachment Alford caused the seizure of 100 mules, worth about \$4,000, and garnished Regan, a debtor of Tiblier, for \$1,500 more.

In addition, as stated in his petition for attachment, he retained in his own hands \$315 which he owed Tiblier on another transaction. Tiblier procured the release of his mules on the next day, by giving bond in the sum of \$1,500, with two sureties, for whose security he was required to deposit with each \$750. He recovered his debt from Regan in about three months, and his deposit back from his sureties—from one in two months, and from the other in a year. During the delays in releasing the moneys so tied up by reason of the attachment, his business, proved to have been a profitable one both here and in Texas, was broken up. He paid in attorney's fees \$150. On the next day after the attachment he moved for a dissolution of the same on the ground of his residence in Louisiana, and the consequent falsity of the affidavit. This motion was resisted by Alford, and through the delays of the law it was only heard with the merits of the case, and was dissolved for the reasons named when the final judgment was rendered.

The defendant recovered \$500 damages on his contract with Tiblier, and he swore himself, on this trial, that Tiblier told him he was a resident of Texas. He also offered a number of witnesses who testified that they had understood from, or had been informed by, Tiblier that he was a resident of Texas. No time was shown, whether before Alford's affidavit or after, when these understandings were had, or representations were made, but it generally appeared that

there was nothing upon which to base the evidence, more than inferences derived from Tiblier's business as a Texas stock dealer, and his talk in relation to a ranch and other interests there.

The tendency of the whole case was that Alford had sworn out his attachment without inquiry, and recklessly, and had caused its execution in the same reckless manner by excessive seizure of property.

No bills of exception were taken on the trial, and no evidence has been offered on this rule, so that, as far as matters took place then, the court can only consider its own notes and recollection.

As to the first and second grounds, my recollection is that I charged the jury that this was not an action on the bond given for an attachment, but an action for damages for a wrongful seizure, and if they should find that the seizure was wrongful, but made in good faith, they should find for the plaintiff, giving him only actual damages proved; but if they should find that the seizure was wrongful, and made in bad faith or malicious, they might assess proper punitive damages in addition to actual damages proved. Further, that a seizure was wrongful if made without proper legal ground to sustain it, and that while malice was to be proved, yet the jury might infer it from evidence satisfying them of the wantonness of the seizure and oppressive conduct on the part of the defendant, "and taking into consideration all the evidence in the case." I still think this was correct, and the jury fully understood me, and regarded the charge.

As to the third ground, I am of the opinion there was no occasion for the surprise of either the defendant or his counsel. All the evidence they offered was admitted, and before the defendant testified, on ruling as to the admissions of the depositions to which counsel for plaintiff objected, I distinctly stated, and, my recollection is, more than once, that evidence of representations made by Tiblier as to his residence, to other parties than the defendant, could not be received by the jury as bearing on the good faith actuating the defendant in making the affidavit for the attachment, unless it was shown that such representations were communicated to the defendant. The proposition that Alford could not have been influenced by representations he had never heard of, is so self-evident that I doubt if counsel could have been surprised even if I had not announced it. The instruction to the jury on the subject was "that if they found from the evidence that the affidavit of Alford was based upon representations made by Tiblier to him, or made by Tiblier to other persons and communicated to him, they should find for the defendant; but

that, on this question, they could not consider representations made to other persons and not communicated to the defendant, for such representations could not have influenced his action." Such instructions ought not to have surprised the defendant or his counsel, and if they did it would hardly be deemed a good reason for a new trial. And a new trial would hardly help the matter, because all the suggestion of the defendant on the subject, made in his motion or in argument, is that on a new trial the defendant himself would swear that such representations were communicated to him prior to making the affidavit. I recollect that on the trial of the case defendant swore positively that Tiblier had told him that he (Tiblier) resided in Texas, while Tiblier swore that he had told him no such thing. The jury seems to have believed Tiblier. *Non constat* that another would not do the same.

With regard to the fourth and fifth grounds—excessive damage and interest—it has been brought to my attention since the argument that the plaintiff has entered a *remitter* of \$1,000 and all interest prior to date of judgment, reducing the verdict and judgment to \$1,500. The actual damages proved by plaintiff on the trial were: the sum paid for counsel fees, \$150; interest on \$1,500 of Regan for two months, \$12.50; interest on \$750 for three months, and interest on \$750 for one year, \$46.87; total, \$220.37. The breaking up, for two months, of his business, in the nature of consequential damages, was proved to have been as much as alleged in the petition—\$600 per month. These latter damages were properly considered by the jury in making up their verdict, if they found, as they evidently did, that the seizure was wrongful, wanton, and malicious. These damages, actual and consequential, amounting to \$1,420.27, substantially compensate the plaintiff, and in my opinion sufficiently admonish the defendant. Exemplary or punitive damages are not allowed for the purpose of rewarding, beyond compensation, the injured party, but as a punishment, to deter others from like conduct. This whole matter is very fully treated in Sedgwick on Damages, chapter entitled "Exemplary Damages."

In this case the verdict as reduced, in my judgment, properly vindicates the law and promotes the ends of justice.

Let the motion for a new trial be overruled and discharged.

JERMAN v. STEWART, GWYNNE & Co.

*(Circuit Court, W. D. Tennessee. May 20, 1882.)***ATTACHMENT — WRONGFUL SUING OUT — MEASURE OF DAMAGES — MALICE AND PROBABLE CAUSE.**

The defendant in an attachment proceeding is entitled to recover from the plaintiff who fails to prosecute his suit with effect the actual damages sustained by him, whether there was any malice or want of probable cause or not; the common-law rule in this regard having no application to attachments under the Tennessee Code, §§ 3471 and 4289, the defendant's rights being regulated by the statute, and not by the common law. The wrongful suing out contemplated by these sections is conclusively proved by a judgment of the court in favor of the defendant in the attachment proceeding. If there be malice and want of probable cause the defendant may also recover punitive damages. This rule of damages applies whether the suit be upon the bond or an action on the case outside the bond.

Motion for New Trial.

Stewart, Gwynne & Co. sued out an attachment in the state court against one Hall, against whom they had a judgment, and levied it on a stock of goods belonging to C. E. Jerman, alleging that the goods belonged to Hall, and were fraudulently concealed in Jerman's name from the creditors. Jerman answered the attachment bill, denying the fraud and claiming the goods as his own, and on the trial the suit was decided in his favor and the bill dismissed. Thereupon, Jerman brought suit in this court for damages, and has obtained a verdict in his favor for \$400. The defendants move for a new trial.

William M. Randolph, for plaintiff.

Myers & Sneed, for defendants.

HAMMOND, D. J. The exception taken to the charge of the court in this case is that the jury were told the plaintiff was entitled to recover his actual damages at all events, the question of probable cause being confined solely to the consideration of the demand for punitive damages. This charge was given after mature deliberation and a very careful consideration of the authorities, and upon a review of the subject I am now satisfied it was correct. It must, I think, be conceded that the element of probable cause applies as well to the actual as the exemplary damages in suits for malicious prosecution of a civil as well as a criminal action. The reason of the rule is well understood, a brief statement of it being that—the law protects and indeed encourages a resort to the process of the courts to redress grievances rather than to any other mode, and if one does so resort without malice and with probable cause he shall not be mulcted in

damages, either actual or punitive, if from mistaken judgment or other cause he fails in his action. But this must be understood as applying to ordinary actions, or such extraordinary ones as are given to the suitor unconditionally. Whenever a statute grants an extraordinary and it may be harsh remedy, the legislature may attach such conditions as it pleases, and if one resorts to that action he accepts those conditions. It seems to me a wise provision of our statute that gives an attachment writ only on condition that the plaintiff shall pay to the defendant whatever actual damages he sustains if the former fails in his action, and such punitive damages as the jury may assess, if with malice and without probable cause he sues out the writ. The judgment of the court in favor of the defendant is conclusive evidence of his right to actual damages. On the trial this was conceded to be our law by the learned counsel for the defendants, if the suit be upon the *attachment bond*; and while on the argument of this motion that concession was somewhat withdrawn, I think there can be no reasonable doubt of it. But this suit not being upon the bond, the application of the principle is denied.

It is a suit upon the facts of the case, as it may be under our Code, abolishing the technical forms of action. The first count of the declaration is in the ordinary common-law form to recover damages for the prosecution of an action without probable cause, and if that had been the only count, and our statute abolishing forms of action did not render it immaterial, it is possible that the plaintiff would be held to show malice and want of probable cause. But the second count states the simple facts, leaving out all averments of malice and want of probable cause; and such an action may be sustained under our system, if the facts justify a recovery in any form. Tenn. Code, (T. & S.) §§ 2746, 2747, 2896, 2975.

The principle above stated is very familiar, but the defendant contends that the plaintiff had his choice to sue on the bond and to take under it, or to sue at common law outside of it and take what the law gives him and no more,—namely, such damages actual or punitive, or both, as the jury may assess,—if he proves that the prosecution was with malice and without public cause; and that the abolition of forms of action has not affected this result, as it is not a question of pleading, but of right to recover where there was no malice but was probable cause. This is very forcible, and I came very near yielding to it; but on reflection it seemed to me, and does now, that it is only a very plausible fallacy.

When the plaintiff in attachment resorts to that statute he becomes bound by it; he may be bound by the common law as well, but he has no right to the writ unless he is bound by the statute. The object of the bond is to secure that liability to the defendant, but it does not create the liability which arises by the terms of the statute from a failure to prosecute the suit with effect. I put to counsel the case of a plaintiff taking the writ by inadvertence or fraud without giving the bond. Would it in such a case be said that the defendant was deprived of his right under the statute to actual damages, irrespective of malice and probable cause, because no bond was in fact given? I think not, and could not so hold, except under the coercion of authority. The plaintiff should be, on principle, bound without any bond, and outside of it, although his sureties may not be. It is like a cost bond: the plaintiff is bound for the costs without a bond, and no matter what his statutory remedies may be, he is liable in an action of *assumpsit* or debt, not only for common-law costs, but statutory costs as well, unless, of course, the statute restricts his liability, which it does not in this case.

I think the defendant in attachment has three remedies: (1) He may sue on the bond and recover according to its condition; (2) he may sue the *plaintiff* on the facts of the case and recover according to the statute, precisely as if the plaintiff had given a bond; (3) he may sue for malicious prosecution, as at common law, and recover according to the common law, where there has been malice and want of probable cause.

The whole question turns on the proper construction of the statute. It says the condition shall be "that the plaintiff will prosecute the attachment with effect, or, in case of failure, pay the defendant all costs that may be adjudged against him, and also all such damages as he may sustain by the wrongful suing out of the attachment." Tenn. Code, §§ 3471, 4289. Subsequent sections provide for the procedure, and among other things it is enacted that under certain circumstances, where there has been a default, the defendant shall not be heard to traverse the grounds of the attachment, but may "commence an action on the attachment bond, and may recover such damages as he has actually sustained for wrongfully suing out the attachment." Code, § 3530. And the following section provides that "if sued out maliciously, *as well as* wrongfully, the jury may, on the trial of such action, give vindictive damages." Tenn. Code, § 3531. The word "maliciously" here means not only that malevolent intention to

do injury commonly called malice, but also that careless disregard of the rights of others which, without real ill-will, the law implies as malice, and which, in cases like this, is an implication from want of probable cause. If it be true, this is a provision for a special case, but it is plain that no intention is manifested, and none could reasonably exist for providing for a different measure of damages in that case from others. It is, I think, clearly a legislative construction of the statute as to the measure of damages in all cases, not only under section 3471, but also under section 4289, and generally under all our attachment laws. These sections originated with the Code, and taking the whole legislation on the subject, together with the state of judicial decision at the time, it is quite certain the construction I have given is correct. The Alabama Code, from which ours is so largely derived, and from which the section we are construing was substantially taken, is construed in the same way, and upon the same reasoning I have adopted, in an able opinion by the present eminent chief justice of that state. *Tucker v. Adams*, 52 Ala. 254. A Kentucky statute, which was similarly construed, contained a clause that malice need not be alleged or proved, but the intention of our statute to give the actual damages in the same way, regardless of malice or want of probable cause, is quite plainly if not as certainly apparent. *Mitchell v. Mattingly*, 1 Metc. (Ky.) 237, 240.

Our own decisions have been in some confusion, but a critical examination of them in the light of the changes made in the law of pleading, before adverted to, and of the legislative construction above mentioned, in the codification of the statutes, will, in my judgment, show that the charge to the jury in this case was correct. In a suit upon the bond there can be no reasonable doubt that the measure of damages is as charged in this case. It is settled that the party is not confined to his remedy on the bond. Now, our statutes say in plain terms that all forms of action are abolished, and that "whenever damages are recoverable the plaintiff may claim and recover, if he shows himself entitled thereto, any rate of damages which he might have heretofore recovered in any form of action for the same cause." Tenn. Code, § 2975. Why should there be one measure of damages in an action on the bond and another in an action on the case, on the same state of facts, when the right is statutory and both actions depend on the same words? If the plaintiff were driven to the *common-law form of action* outside the bond, he must both allege and prove malice and want of probable cause; but he is not so driven.

He may state the facts, and if they show malice and want of probable cause he can recover either under the common law or the statute, it being quite immaterial which; or, if the facts show neither malice nor want of probable cause, he may recover actual damages under the statute, certainly where he is suing after a default, and I see no reason why there should not be the same measure of damages in all other cases. If the plaintiff alleges malice and want of probable cause, it would, under our system of pleading, be disregarded if he could under the statute recover, notwithstanding these allegations were not proved. Whether to obtain punitive damages he could prove these facts without averring them, need not be decided in this case.

The very obligation of the plaintiff is (and this whether he gives a bond or not, for he is not entitled to the writ on any other condition) that "he will prosecute the attachment *with effect*," or "in case of failure" to so prosecute that he will pay, etc., all such damages as the defendant sustains "by the wrongful suing out of the attachment." Here is the legislative definition of "wrongful," which means a failure to prosecute with effect, and we are not authorized in any suit for these statutory damages to import from the common law any element of malice or want of probable cause, for the statute does not require it, and its object is to create a right or remedy, and prescribe its limitations and conditions. It is not dealing with a common-law remedy, nor legislating on a common-law subject. If the statute did not fix these damages, the defendant in attachment could obtain only such as the common law would give him; but such is not his unfortunate condition; he obtains his actual damages at all events, if the plaintiff in this extraordinary and harsh remedy fails to establish the frauds he charges injuriously.

Under the influence of the common law the earlier statutes did not receive this liberal construction, but later they did, by the legislature, if not by the courts, as I have endeavored to show. I shall not take space here to review the decisions critically, but I have read them so, and am content to cite them in support of these views. In *Sloan v. McCracken*, 7 Lea. 626, the learned judge says the suit is founded on malice and want of probable cause, but the *decision* was that the plaintiff could not recover because he had not shown a judgment in his favor in the attachment suit. The inference may be that if he had shown that fact he could have recovered, as the writ would have then been shown to have been "wrongfully sued out," because

it had not been prosecuted "with effect." The law may have implied from this failure such malice and want of probable cause as would answer that requirement, as was said in *Spengle v. Davy*, 15 Gratt. 394; but whether it did or not there would have been a recovery if the attachment suit had been decided in favor of its defendant. This is as fair an inference from the decision as that proof of malice and want of probable cause *aliunde* the judgment for the defendant would have been required. The case does not decide the question here made either way. In *Littleton v. Frank*, 2 Lea. 300, it is said "the attachment issued wrongfully, although on probable cause." The other cases are as follows: *Lucky v. Miller*, 8 Yerg. 90; *Smith v. Story*, 4 Humph. 168; *Smith v. Eakin*, 2 Sneed, 456; *Jennings v. Joiner*, 1 Cold. 645; *Ranning v. Reeves*, 2 Tenn. Ch. 263; 21 Am. Law Reg. (N. S.) 281.

In the view I have taken of this case adjudications like *Sonneborne v. Stewart*, 98 U. S. 187; *S. C. 2 Woods*, 603; *Evans v. Thompson*, 12 Heisk. 534; *Gayoso Gas Co. v. Williamson*, 9 Heisk. 314; *Raulston v. Jackson*, 1 Sneed, 126; *Pharis v. Lambert*, Id. 227; *Kendrick v. Cypert*, 10 Humph. 290; and *Hall v. Hawkins*, 5 Humph. 355, which have been so much pressed by counsel for defendants, have no application to a case like this.

I am of opinion that there was no error in the charge, and a new trial is refused. Motion overruled.

JERMAN v. STEWART, GWYNNE & Co.

(Circuit Court, W. D. Tennessee. June 10, 1882.)

1. COSTS—DEPOSITIONS—FEES FOR TAKING—STATE OFFICIALS.

Although the Revised Statutes only mention a fee of 20 cents a folio of 100 words for taking and certifying depositions to be allowed a clerk of the United States courts or a commissioner of a circuit court, and no act of congress prescribes any fee for any other officer authorized to take depositions, the courts will tax the same fees allowed by congress to clerks and commissioners for that service to any state official taking the deposition, and not the fees allowed by the state law for a similar service.

2. SAME—ATTORNEY'S FEES FOR DEPOSITIONS—AGREEMENT OF COUNSEL.

When counsel, for their mutual convenience, agree that depositions taken in a suit in the state court between the same parties may be read on the trial of a cause in this court, the attorney of the prevailing party is entitled to the tax fee of \$2.50 for each deposition admitted in evidence, as if it had been taken in this court.

3. SAME--BILL OF COSTS--VERIFICATION OF.

Section 984 of the Revised Statutes, requiring a bill of costs to be verified by the oath of some one having knowledge of the facts, applies to all cases as well as to government cases, and the bill of costs of an official for taking depositions, or making transcripts of a record to be used as evidence, must be so verified before the costs can be taxed.

Motion to Retax Costs.

In the taxed bill of costs the following items are excepted to by the defendant as improperly allowed by the clerk, viz.: Fees of W. W. Thompson, justice of the peace, for taking depositions, \$9; and of J. W. Wilson, justice of the peace, for like services, \$6.04; and of James Fentress, Jr., clerk of the state court, for certified transcript, \$9.25; and the attorney's docket fees for 25 depositions, at \$2.50 each, \$62.50.

The depositions were used under the following agreement of counsel:

"It is agreed in this case that the depositions of witnesses heretofore taken in the chancery case of *Stewart, Gwynne & Co. v. G. A. Hall and C. E. Jerman*, and now on file in said cause at the chancery clerk's office at Bolivar, or any part or number of said depositions, may be read and used in evidence on the trial of the above-stated cause now pending in the United States court at Memphis, Tennessee, by either party, with the privilege of retaking said depositions, or any part thereof, if it shall be deemed necessary by either party, upon the usual notice in such cases. This September 6, 1880.

"C. E. JERMAN, by FALKNER & FREDERICK, Attorneys.

"MYERS & SNEED, Attorneys for Defendants."

The items taxed in favor of the justices of the peace are for taking depositions originally filed in this court under an agreement of counsel waiving all objections, and are the amounts entered by those officers on the depositions as their charges for taking them, and the item indorsed on the transcript is the clerk's charge for a certified copy of the record of the attachment suit in the state chancery court.

Myers & Sneed, for the motion.

William M. Randolph, contra.

HAMMOND, D. J. The act of congress of February 26, 1853, c. 80, (10 St. at Large, 161; Rev. St. § 823 *et seq.*) makes no provision for fees or compensation to other officers or persons than attorneys, district attorneys, clerks of the United States courts, marshals, commissioners, witnesses, jurors, and printers. The next chapter of the Revised Statutes regulates the subject of evidence, and provides for taking depositions where that mode of proof is permitted; but while section 863 authorizes any judge of any court of the United States,

or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public to take depositions *de bene esse*, and regulates the practice with great care; and while section 866 authorizes the courts of the United States to grant a *dedimus potestatem* to take depositions according to common usage, in neither of these chapters nor elsewhere, so far as I can ascertain, is there any direction as to the fees or compensation to be allowed these officers for taking the depositions, except that by section 828 clerks of the circuit or district courts, and by section 847 commissioners of the circuit court, are allowed "for taking and certifying depositions to file, 20 cents for each folio of 100 words." Rev. St. §§ 828, 847, 863, 866, 858-910. A commissioner under a *dedimus potestatem* may be an officer of any kind, or any one not an officer. He derives his authority from the *dedimus potestatem*, and is not within section 847 prescribing fees for commissioners of the circuit court.

I have been unable to find any case furnishing a guide in taxing costs as to these other officers for taking depositions. It is to be observed that a justice of the peace is not one of the officers designated to take depositions by these statutes. He may be empowered by a *dedimus potestatem*, as any one may, but he is not otherwise authorized. Under our state practice no *dedimus potestatem* is required, though one may issue; and all the parties have to do is to give the proper notice or file interrogatories, and the deposition may then be taken before one of the designated officers, according to the requirements of the statute, and he is entitled to a fee of only one dollar in any and all cases. A justice of the peace is one of the officers authorized by the state practice. Tenn. Code, (T. & S.) §§ 3836, 3843, 3844, 3847, 3865, 4551, subsecs. 13, 4549, subsec. 20.

Whether this state practice is a legal mode of taking proof in this court or not, nearly all our depositions, as a matter of fact, are so taken, it being an almost universal and commendable custom to agree as to the manner of taking, as was done in this case; and since I have been on the bench I have never known a motion to suppress depositions for any irregularity in taking them; hence the importance of properly determining the costs to be taxed in such cases. The state fee of one dollar is so inadequate that an officer will rarely do more than swear the witness where the deposition is taken without

formality, and written out by the attorneys themselves, which is the usual mode, unless by agreement the writing is done by the officer or some one appointed to do it, and then the expense (which is usually, where the deposition is taken in another state, the fees there allowed) is taxed as costs without objection, as the clerk has done in this case. But the defendants here object, and insist that no more than one dollar can be taxed, and this is the question submitted for determination.

In this case the justices of the peace are officers in the state of Mississippi, and I doubt if they are intended to be restricted in this matter to the fees prescribed for like officers in this state. The Code says nothing about the compensation of officers taking depositions in another state, and the compensation of one dollar is found only in the chapters prescribing the fees for clerks, justices of the peace, and other officers in Tennessee. I am by no means certain that our state courts would hold that no more should be allowed than our own statutes allow here, or that they would not hold that whatever reasonable fees were allowed for the services by the laws of the state where the depositions were taken might be charged as costs in the case. I am informed by the taxing officers of this city that it is usual to tax whatever reasonable fees are charged in such cases, and that by a sort of common understanding, though not regarded as strictly legal, such is the rule of taxation, controversies being adjusted by agreement, and that there is not known to be any adjudicated case settling the practice. This accords with my own experience in the state courts of this city. I am not satisfied, therefore, that according to the state law these officers would be entitled to only one dollar each for the two depositions taken by them, though I do not feel constrained to decide that point.

Prior to the above-mentioned act of congress of 1853, regulating fees, they were taxed according to the state practice as adopted by rule of court or constant usage, and where the state laws happened to be silent as to the few items not provided for, the method was to refer to some allowance in the state court "for a service corresponding with the one in this court, and to tax the costs accordingly." *Re Costs in Civil Cases*, 1 Blatchf. 652; *Pomroy v. Harter*, 1 McLean, 448; *Hathaway v. Roach*, 2 Wood & M. 63; *Ex parte Paris*, 3 Wood & M. 227; *U. S. v. Ringgold*, 8 Pet. 150.

But, while this was the rule of taxation, if the state legislature should abolish a previously-existing allowance it was not binding on the federal courts. *Re District Attorney's Fees*, 1 Blatchf. 647.

Where the fees were not precisely regulated they were to be governed on the basis of *quantum meruit*, according to the analogies for similar services. *Bottomley v. U. S.* 1 Story, 153. In *Fry v. Yeaton*, 1 Cranch, C. C. 550, costs of taking depositions by a state magistrate under the *de bene esse* clause of the judiciary act were taxed, although no act of congress allowed it, because such costs were taxable under the state law. The chief justice held, in *Re Clerk's Fees*, Taney, Dec. 453, that where the court was authorized to allow reasonable compensation "we must look to what the law allows in similar cases." And in *The Antelope*, 12 Wheat. 546, it was said that where neither an act of congress nor the state law furnished any positive law for compensation, it must be regulated in the discretion of the court, taking care to make it reasonable.

I do not wish to depart from the decisions which hold that where congress has legislated and allowed no fees, none can be allowed by the courts on the doctrine of reasonable compensation, and where this plain statute says that the officers enumerated shall receive certain fees and none other, that the courts cannot enlarge them. *The Baltimore*, 8 Wall. 377; *Jones v. Schell*, 8 Blatchf. 79; *Dedekam v. Vose*, 3 Blatchf. 153. But here it is obvious that the principle does not apply, because these officials are not mentioned in the act of congress regulating fees, and the omission to provide for them cannot be taken as an intention to deny them all compensation. *Nichols v. Brunswick*, 3 Cliff. 88. In *Etheridge v. Jackson*, 2 Sawy. 598, Judge Deady takes the distinction between the *right* to costs and the mere *mode of taxing them*. In trials at law the former depends on the laws of the state where there is no act of congress, but the latter on the practice of the federal court itself. To the same effect are *Field v. Schell*, 4 Blatchf. 435, and *Burnham v. Rougely*, 2 Wood & M. 417.

These decisions all show that from the first congress has intended that the prevailing party should be allowed his reasonable costs, and although the act under consideration has prescribed certain fees for certain officers, it has omitted to prescribe for others, and the question is whether we shall continue to look to the state law for our analogies in these cases, as we did before that act, or now look to that act itself where it furnishes the analogy. I see no reason, if congress says a clerk or commissioner shall receive 20 cents a folio for taking a deposition, for holding that if a judge, justice of the peace, notary public, or other magistrate takes it he shall receive less. We never looked to the state law of costs, as I have shown, as rules of positive law for our obedience; no act of congress requires us to do so as to

all costs, though one or two of the earlier acts did as to some; but the right to costs in a particular case being established by state law, we taxed the amount allowed by that law as a matter of convenience in determining for ourselves by analogy what was reasonable to be taxed. But congress having now said that for taking a deposition a certain allowance shall be made to two classes of officers, we have no need to look to any state law for analogies as to others, and should look to our own act of congress where it furnishes one.

I hold, therefore, that the proper fees to be taxed for the officer taking depositions in this court are the same fees allowed to our clerks and commissioners for similar services, and this no matter how or where they are taken. The same principle applies as to the fees taxed to the chancery court clerk for the transcript, though there is no embarrassment as to that item because both the Revised Statutes and the Code of Tennessee prescribe the same fee of 10 cents a folio of 100 words for transcripts. Rev. St. §§ 828, 983; Code, (T. & S.) 4551, (35.) But the plaintiff should not be allowed for both the transcript of the final decree and the full transcript of the entire record. Counsel did not remember precisely how both came to be used, nor does the court, except that upon the ruling made upon the exception to reading only the final decree the plaintiff produced a full transcript. It may not have been necessary, but the exception of the defendants made it prudent, and they cannot now complain. I think, however, it was unnecessary, and the fees of the full transcript will be taxed, but not the other.

A further objection is made that as to these costs there is no affidavit attached of the party, or some other person, having knowledge of the facts that the services charged have been actually and necessarily performed as therein stated, according to the requirements of the statute. Rev. St. § 984. It is a mistake to suppose that this applies only to government cases. It is in the original act of 1853, and in the Revised Statutes, by its terms is applicable to all cases, and has been enforced as to fees for taking depositions *de bene esse*; and where the taxation is claimed for witness fees, under section 983 of the Revised Statutes, the affidavit must show that they have been actually paid. *Beckwith v. Easton*, 4 Ben. 357. These sections of the Revised Statutes, and the section of the original act, do not in terms include officers taking depositions unless they be clerks of the United States courts or commissioners of the circuit court; but inasmuch as there is no special legislation as to others, and we must refer to these provisions by analogy, as has been shown, for the purposes

of determining the compensation, and because it is important that the practice should be uniform in taxing costs, and as it is a matter of practice concerning which we have no positive law, except as declared in these sections, I do not see why the courts should not follow this legislative direction of a rule of practice as to all bills of costs. If one of our commissioners takes a deposition he must make this affidavit, and there is no reason why other officers who claim fees for like services should not be required to make it. But it has never been the practice in this court to swear to these taxed bills of costs, not even by the clerks, marshals, or commissioners, who are plainly required to do so; because, perhaps, it has been understood that the statute applies only to government cases. This objection is the first ever made on that account in this court, and it comes on a motion to retax the costs after they have been taxed and paid into court. I shall not, therefore, disallow the costs for the omission in this case. The practice of the court has been in violation of the statute in all cases, except government cases, and the statute is only extended to these particular items by a necessary implication and a construction that is now made for the first time in this court. Hereafter, however, if objection shall be seasonably made at the time of taxation, no bill of costs will be taxed without the affidavit required by the statute. The proper practice seems to be to have the officer taking the deposition include in his return a bill of the costs, and the affidavit of himself, or some one having knowledge of the facts, that the amount paid witnesses, and for exemplifications and copies used, if any, are properly entered, and that his own services have been actually and necessarily performed, as therein stated, and from this return the judge or clerk can tax the costs. But the statute permits the required affidavit to be made, by any one having knowledge of the facts, at any time before taxation by the court. There can be no doubt of the necessity for this in case the official is a United States court clerk or commissioner, and, I think, for the reasons stated, it necessarily applies to all bills of costs. The fees of a transcript should be verified in the same way.

The objection made to the attorney's fees for depositions is not well taken. They were used under an agreement of counsel that they should be "read and used in evidence on the trial" in this case. The statute gives to the attorney, "for each deposition taken and submitted in evidence in a cause, \$2.50." Rev. St. § 824. This does not mean that the depositions shall be formally taken, and the fees allowed only for such as are formally taken, but for those that are

taken in any way and admitted in evidence. The use of the deposition on the trial is what entitled the attorney to the fee. *Stimpson v. Brooks*, 3 Blatchf. 456. In *Ex parte Robbins*, 2 Gall. 320, the law allowed certain fees for filing interrogatories, the libel and answers which were taxed, where, by agreement of counsel, the case proceeded without the papers being actually filed. Mr. Justice Story said: "No interrogatories or answers were, in fact, filed; for all parties, for their mutual convenience, seem to have waived any formal proceedings. The courts have in such cases adjusted the taxable costs in the same manner as if these proceedings were formally entered on the record *apud acta*." And in *Troy Factory v. Corning*, 7 Blatchf. 16, it was ruled that the fee is allowed when the deposition is taken out of court, "under authority which will entitle it to be read as evidence in court." Depositions read from the transcript of the record in the circuit court, on appeal in an admiralty case from the district court, are not taxable; but this is because they were taxable in the district court, and are not entitled to be taxed twice. *Dedekam v. Vose*, 3 Blatchf. 77.

The parties here agreed, for their convenience, to use depositions already taken, and, to all intents and purposes, they stood in all respects precisely as if taken in the usual way, except that they saved the costs of retaking. This fee is not a part of the cost of taking the deposition, but, like the docket fee, is an allowance to the attorney as taxable costs for his professional services in the case, and unless the agreement of the parties waives it, it is as much taxable as any other costs.

Overrule the objections and conform the taxation to the principles here laid down.

NOTE. The supreme court, under an act of congress giving the justices thereof power to prescribe a tariff of fees for certain officers in bankruptcy, have, by general order No. 80 in bankruptcy, allowed to registers for taking depositions 20 cents a folio, the statute giving them "the fees now allowed by law." Rev. St. §§ 5124, 5127.

BOSTON BEEF PACKING Co. v. STEVENS and others.

*(Circuit Court, S. D. New York. March 27, 1882.)***1. TORTS—LIABILITY FOR INJURIES—REPRESENTATIVE CHARACTER.**

An action cannot be maintained against an executor or trustee in his representative character for a wrongful act which was not committed by him in his official capacity.

2. SAME—WRONGFUL USE OF ONE'S OWN PROPERTY.

Whoever, for his own advantage, authorizes his property to be used by another in such manner as to endanger and injure, unnecessarily, the property or rights of others is answerable for the consequences whether the injury be caused by negligence or by the erection of a nuisance.

3. SAME—INTERPOSITION OF THIRD PARTY—NOT TO EXCUSE.

The mere fact that a third person is interposed between the owner or principal and the party injured will not affect the responsibility of him who originates and sanctions the injury.

4. SAME—LEASE OF UNFIT AND UNSAFE BUILDING.

Where a party leased a building as a storehouse which was unfit and unsafe for use as a storage warehouse, and it fell without any fault contributing to the fall on the part of the lessees or of the plaintiff, thereby injuring the house of the plaintiff, which was adjoining thereto, such lessor is liable for the injury.

WALLACE, C. J. The defendants are sued personally, and also in their representative capacity as executors and trustees, under the will of Calvin Stevens, deceased, for damages alleged to have been sustained by the plaintiff by the fall of a building owned by the defendants as such executors and trustees, and which had been leased by them for a storage warehouse. The jury found for the plaintiff, and under the instructions of the court their verdict established two propositions: *First*, that the building was unfit and unsafe for use as a storage warehouse at the time the defendants let it for such use; and, *second*, that the building fell without any fault contributing to the fall on the part of the lessees. The plaintiff was the occupant of an adjoining building, and the verdict of the jury further established that there was no contributory negligence on the part of the plaintiff.

Upon what theory the defendants were sued in their representative character, and by what rule of law their liability in such character can be sustained, has not been satisfactorily shown. The question was reserved upon the trial, but no authority has been adduced to change the opinion expressed by the court upon the trial, that an action cannot be maintained against an executor or trustee in his representative character for a wrongful act which was not and could not be committed by him in his official capacity, but which, because it was a wrongful act, was in excess of his authority.

A new trial, however, should not be granted. The only defendants in the case are the individuals named as such, and although they are also described in their representative character, they cannot, in an action at law, sever their identity. The same individuals cannot have a judgment in their favor and one against them in the same record.

The plaintiff must amend the process, pleadings, and proceedings by striking out the description of the defendants' official character.

Upon the main question in the case, that of the liability of the defendants for negligence, there is no reason to doubt the correctness of the rulings at the trial. The defendants were carefully protected by their instructions to the jury from all responsibility for the acts of the tenant. They were held liable only to the extent that for their own profit they authorized and sanctioned the acts of the tenants in the use and control of their property. As the verdict was upon the theory that the tenants were not guilty of negligence, unless the defendants are held liable the singular result would follow that a wrong has been committed for which no person can be held responsible.

Whoever, for his own advantage, authorizes his property to be used by another in such manner as to endanger and injure unnecessarily the property or rights of others, is answerable for the consequences. Sometimes the liability has been referred to the law of nuisance, (*Norcross v. Thoms*, 51 Me. 503; *Fish v. Dodge*, 4 Denio, 311;) but it exists when predicated upon negligence equally as when predicated upon an intentional wrong. The mere fact that a third person is interposed between the owner or principal, and the party injured, cannot affect the responsibility of him who originates and sanctions the injury. *Swords v. Edgar*, 59 N. Y. 28. As is said in *Todd v. Flight*, 9 C. B. (N. S.) 377: "If the wrong causing the damage arises from nonfeasance or the misfeasance of the lessor, the party suffering damage may sue him." The case of *House v. Metcalf*, 27 Conn. 631, is precisely in point. The rule is too well settled to require further citations.

The motion for a new trial is denied.

DAVIS and others v. NIAGARA FIRE INS. Co.

(District Court, N. D. Illinois. February 3, 1882.)

1. INSURANCE AGENT—EMPLOYMENT OF.

Defendant, a foreign insurance company, appointed plaintiffs as its agents to place risks and transact its business, and issued a commission or appointment to plaintiffs as such agents, and subsequently, in its reports to the auditor of the state, and in taking out its annual licenses and certificates for the transaction of business in the state, and by letters to the auditor from its secretary, named the plaintiffs among its authorized agents for the ensuing year. *Held*, that defendant, by complying with the state statute from year to year, designating plaintiffs as its agents, does not necessarily imply an agreement or intention to continue plaintiffs as such agents for any especial time.

2. SAME—TERM OF APPOINTMENT.

Promises held out by the secretary of the company, in the absence of proof of his authority to bind the company, cannot be construed into an agreement to change the terms of plaintiffs' appointment from an agency at will to an agency for a fixed term.

Schuyler & Follansbee, for plaintiffs.

Lawrence Proudfoot, for defendant.

BLDGGETT, D. J., (*orally*.) This is a suit by plaintiffs for the recovery of damages from defendant on the ground that the defendant unwarrantably revoked the authority of plaintiffs to act as defendant's agents in the city of Chicago. The proof shows, and without dispute, that on or about February 1, 1875, the defendant appointed the plaintiffs its agents to place risks and transact its business in this city. A commission or appointment to the plaintiffs as such agents was issued by the defendant, empowering them to transact the business of insurance for the defendant and as its agents, subject to the rules and regulations of the company, and instructions to be from time to time given by its officers, with no limitation as to the time the agency was to continue. The defendants entered upon the performance of their duties as such agents from year to year. Afterwards, the defendant, in its reports to the auditor of this state, and in taking out its annual licenses and certificates for the transaction of business in this state, named the plaintiffs among its authorized agents. In January, 1881, the defendant, by letter from its secretary to the auditor of state, designated certain persons, among whom were the plaintiffs, to act as agents of the defendant in this state for the then ensuing year, and the auditor, in pursuance of this request, issued a license to the plaintiffs as such agents, and plaintiffs continued to act as such agents for defendant up to the first day of May last, when

their agency and power to act for and in behalf of defendant was revoked, and the business transferred to other persons. The plaintiffs contend that by the action of the company at the beginning of the year, in requesting from the auditor that they be named among the defendant's agents, they were appointed and made agents of defendant for the entire fiscal year from the first day of January, 1881, and claimed the right to recover as damages the commissions they would have earned upon the business they could have transacted for the defendant during the year, basing their estimate of the probable amount of such business and earnings upon the results of their business in previous years. Defendant insists that the appointment of plaintiffs as such agents was to continue only during the pleasure of the defendant; that it was a delegation of power revocable at will; and that defendant could and did rightfully terminate the plaintiffs' agency in May last.

There is certainly nothing in the original appointment or commission which expressly or by implication seems to bind defendant to continue the agency of plaintiffs for any specified time; nor do I think the fact that the defendant, in complying with the statute of this state, from year to year, designated the plaintiffs as its agents, necessarily implied any agreement or intention to continue plaintiffs as such agents for the ensuing fiscal year, or for any special time. It would certainly be a great embarrassment to the business of all foreign insurance companies doing business in this state, if, by naming or designating any person to the auditor to act as agent for the company, such person's agency could not be terminated for 12 months, or until the end of the fiscal year. It would put the companies, bound hand and foot, into the hands of their local agents, and transfer the management of their affairs and business from their boards of directors and executive officers to these agents. Such a request means no more than that while the company sees fit to deal with the person named as its agent, he is to be treated as such by the auditor, and the public dealing with him, under the law; but it creates no obligation on the company to retain the agent for any certain time. If the appointment was revocable in the first place, it is certainly not made irrevocable by any such request to the auditor.

Plaintiffs have also offered some evidence as to promises held out to them by Mr. Goodrich, the secretary of the company, in March last, in regard to the prospects of business for the ensuing year, and indicating a change of policy as to risks, and an intention to increase their business. But this cannot be construed into an agreement to

change the terms of plaintiffs' appointment from an agency at will to an agency for a fixed term; and, besides, there is no proof that Mr. Goodrich had power to bind his company in any such manner.

I therefore conclude that this was, and continued to be, a mere agency at the will of the defendant, and that no right of action accrued to plaintiffs by its revocation.

The plaintiffs' suit will be dismissed.

UNITED STATES v. EARNSHAW.

(District Court, S. D. New York. May 23, 1882.)

1. CUSTOMS DUTIES—APPRAISEMENT—PROTEST—REVIEW.

Where the collector has acquired jurisdiction of the subject-matter of the assessment of duties through the importation of goods that are liable to duty, any irregularities in the appraisement and liquidation must be first reviewed by protest and appeal, pursuant to section 2931, or they cannot be raised in a collateral suit.

2. SAME—REAPPRAISEMENT.

In a suit by the government to recover an alleged balance of duties from an importer, where the answer alleged the demand of reappraisement, and that the collector appointed to act on the reappraisement a person who was not a "discreet and experienced merchant," was a personal enemy of the defendant, and not competent to act impartially; that the collector was notified of defendant's objections, who refused to remove such person; the reappraisement was thereafter made by him with the general appraiser; but the answer contained no averment of any protest or appeal from the liquidation based on such reappraisement: *held*, on demurrer, that the collector had jurisdiction of the proceedings; that the irregularities alleged were, at most, errors in the proceeding, reviewable by the secretary of the treasury on protest and appeal; and that the answer was insufficient for want of any averment thereof.

Demurrer to Answer.

Stewart L. Woodford and *Wm. C. Wallace*, for plaintiff.

Bliss & Schley, for defendant.

BROWN, D. J. This is an action to recover an alleged balance of duties due on four importations of goods by the defendant. The estimated duties were paid at the time of the entry, and the goods were delivered to the defendant. On a subsequent appraisement the duties were liquidated at a larger amount, and this suit is brought to recover the difference.

The answer states that the defendant, being dissatisfied with the appraisement, forthwith gave notice to the collector in writing of such dissatisfaction, pursuant to section 2930 of the Revised Statutes;

that the collector neglected his duty to appoint a "discreet and experienced merchant," as required by said section, and selected one W. D. M. to be associated with the general appraiser to examine and appraise said goods; that the said W. D. M. was not "a discreet and experienced merchant," within the meaning of the said statute; that he was a personal enemy of the defendant, had threatened to break up his business, sought to injure him, and was not competent to act fairly and impartially, of which the plaintiff was notified; that he was at the time in the plaintiff's employ, and had given information against the defendant; that the treasury regulations require the names of the appraisers appointed to be withheld until they assemble for the performance of their duties, and that the defendant had no previous knowledge of this selection; that the defendant had previously objected to the appointment of this person as merchant appraiser; that he was directed by the secretary of the treasury to make known his objections as soon as he should be informed of such appointment; and that he did give the collector such notice of his objections in writing as soon as so informed, and requested the appointment of some other merchant, which was refused; that the appraisement was made by W. D. M. and the general appraiser after such objections, and that such appraisement was not in accordance with law and was void, and was not made by persons authorized or competent by law to make the same; that the assessment and liquidation of duties based thereon were erroneous and void; and that the legal duties had been paid in full.

To the several counts in the complaint the same answer is made.

The plaintiff demurs to the answer as insufficient in law.

By section 2931, Revised Statutes, it is provided that upon any entry of any merchandise the decision of the collector as to the rate and amount of duties shall be final and conclusive against all persons interested therein, unless within 10 days after the ascertainment and liquidation of the duties notice in writing be given to the collector, setting forth distinctly and specifically the grounds of objection, and within 30 days appeal to the secretary of the treasury.

The answer does not allege any such protest or appeal by the importer after the final liquidation of the duties in this case. It is claimed, upon the facts pleaded, that the person selected as merchant appraiser was not in law a competent person to serve upon the reappraisement; that this reappraisement was, therefore, null and void, and that the subsequent liquidation of the duties was without jurisdiction and void. It is admitted that no suit against the United

States could be maintained to recover back duties once paid except upon due protest and appeal, as required by section 2931, such being the express provision of that section. But it is urged that in a suit by the government to enforce the collection of duties, a lawful and valid liquidation must be proved as a condition precedent to recovery.

In the case of *Clinkenbeard v. U. S.* 21 Wall. 65, the court say: "It is undoubtedly true that the decisions of an assessor, or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax. * * * When the government elects to resort to the aid of the courts it must abide by the legality of the tax." If the liquidation of the duties in this case had been made without the scope of the jurisdiction of the collector, no action for the recovery of the duties assessed could be sustained; and no protest or appeal would have been essential to the defence; as, for instance, upon an alleged liquidation of duties upon goods which had never been imported at all.

The averments in the answer do not show a case beyond the scope of the collector's jurisdiction, but obviously a case within it. All of the objections referred to in the answer pertain to the manner in which the duties of the collector were performed in the exercise of his unquestioned jurisdiction in the appointment of the merchant appraiser upon the reappraisement demanded, his refusal to rescind the appointment after objection made, and the subsequent appraisement and liquidation. These, it seems to me, amount at most to errors, if errors they were, in the various steps preceding the final liquidation of the duties. Whether the merchant appraiser was, as required by the statute, "a discreet and experienced merchant," or whether any of the other objections made were true in fact, or, if so, were sufficient in law to disqualify the merchant appraiser, were questions which were necessarily to be passed upon by the collector, in the first instance, (*U. S. v. Arredondo*, 6 Pet. 729,) like any other question of fact which is by law made subject to his decision in the course of the proceedings. The statute which makes the assessment and liquidation of duties final and conclusive, unless specially excepted to by protest and appeal in the manner specified, includes, in my judgment, all the preliminary steps which arise within the collector's

lawful jurisdiction to determine, and upon which the ultimate liquidation rests. Any error in these preliminary steps will be brought up for review by such protest and appeal, (except as to the valuation itself, which is not reviewable,) and, if not thus excepted to, cannot be inquired into or corrected in any collateral proceeding. Where the amount of duties to be assessed has been dependent upon the question of fact whether the goods were of one kind or another, or whether they were free goods or not free goods, it has been repeatedly held that the liquidation made, if not appealed from, is final and conclusive upon the importer and his sureties in a suit brought by the government to enforce payment of the duties as liquidated. (*Westray v. U. S.* 18 Wall. 322; *U. S. v. Cousinery*, 7 Ben. 251; *Watt v. U. S.* 15 Blatchf. 29; *U. S. v. Phelps*, 17 Blatchf. 312; *U. S. v. Bradley*, 25 Int. Rev. Rec. 75;) and, in my judgment, the principle of those cases applies equally to the present case, inasmuch as the objections here alleged were equally within the jurisdiction of the collector to determine, and it must be presumed that he duly considered and passed upon them.

In the case of the *U. S. v. Chase*, 23 Int. Rev. Rec. 161, (affirmed on appeal, 9 Fed. Rep. 882,) it was held that the provision making the collector's decision final unless appealed from was intended to apply to irregularities in the mode of procedure by the appraisers, as well as to errors of judgment.

An appeal to the secretary of the treasury upon the objections alleged in the answer would not be an empty form, as claimed by the defendant, on the ground that the secretary would have no power to consider them. These objections do not pertain simply to the amount at which the goods were appraised, but to the competency and propriety of the merchant appraiser selected to act; and whether there has been any appraisement by such a tribunal as the law designs to afford to the importer upon his claim to a reappraisement, (*Tappan v. U. S.* 2 Mas. 393, 405-6;) and upon this question the secretary of the treasury, upon appeal, would have full power to review and correct any erroneous decision of the collector. Under section 2931, therefore, I think due protest and appeal to the secretary of the treasury must be first resorted to before these objections can be raised in a collateral suit. Should the objections be overruled, any legal exceptions specifically taken, affecting the competency and power of the board of appraisers to act in making a reappraisement, could be heard in a suit to enforce payment of an alleged deficiency based on such reappraisement, in like manner as similar exceptions are heard in a

suit to recover back an excess of duties illegally exacted. *U. S. v. Arredondo*, 6 Pet. 729; *Belcher v. Linn*, 24 How. 508, 522; *Bartlett v. Kane*, 16 How. 263, 272; *Christ v. Maxwell*, 3 Blatchf. 129; *Iasigi v. The Collector*, 1 Wall. 375; *Stewart v. Merritt*, 2 FED. REP. 531, 533.

The demurrer should, therefore, be sustained, and judgment ordered for the plaintiff, unless the defendant, within 20 days, amend his answer, which he has leave to do upon payment of the costs of the demurrer.

GRANTLAND v. CITY OF MEMPHIS.

(Circuit Court, W. D. Tennessee. May 20, 1882.)

SCIRE FACIAS—REVIVOR OF JUDGMENT—EXTINCT MUNICIPAL CORPORATION—SUCCESSOR—INTEREST.

The legislature having abolished the charter of the city of Memphis and organized the same inhabitants and territory into a municipal corporation by another name, and the supreme court having construed the legislation as creating a successor to the old corporation liable for its debts, *held*, that *scire facias* is the proper remedy to revive a judgment existing against the old corporation at the time of the repeal of the charter, against the new corporation; and that the fact that the assets of the extinct municipality are undergoing administration in a court of equity under regulations prescribed by the legislature does not defeat the plaintiff's right to a revivor, nor does the fact that there is no property liable to execution in the hands of the new corporation defeat that right. And interest on the judgment is allowed by the statutes.

The plaintiff recovered in this court on June 14, 1879, a judgment against the city of Memphis for \$1,778.75. A *scire facias* issued against the taxing district of Shelby county, to show cause why this judgment should not be revived against it as the successor of the city of Memphis, to which the taxing district has demurred, because—

“(1) From the face of said writ it appears that the plaintiff in the above-entitled cause has already recovered a judgment against the city of Memphis, and therefore there can be no revivor against this demurrant. (2) It is insufficient, because there was none of the goods and chattels or assets of said city of Memphis in this defendant's hands at the death of said city of Memphis, and are not now any of the same to be administered, but these assets and all others of said city were and are devoted by law to the payment of the debts of said city, including this judgment, wherefore there can be no revivor by writ of *scire facias* against this defendant.”

By acts of the legislature the charter of the city of Memphis was abolished, and a corporation organized with municipal powers except those of taxation, which were reserved to the legislature, by which body all taxes for municipal purposes are levied. This new corpora-

tion is composed of the same inhabitants and territory as the old city of Memphis, but its official style is "The Taxing District of Shelby county," and it is by this *scire facias* sought to revive this judgment against it.

William M. Randolph, for plaintiff.

C. W. Heiskell, for defendant.

HAMMOND, D. J. The Revised Statutes, § 716, authorize the federal courts to issue the writ of *scire facias* according to the usages of the common law and the law of the states. Bump, Fed. Proc. 401, and notes; *Bank v. Halstead*, 10 Wheat. 51, 55. The uses of the writ at common law and under the early English statutes are very numerous, though there was some dispute whether strictly, at common law, it applied to any personal action. Foster, *Scire Facias*, *passim*; 8 Bac. Abr. (Bouvier's Ed.) tit. "*Scire Facias*," 2 Tidd, Pr. (3d Ed.) 1090; 63 Law Lib. 1 *et seq.*; Freeman, Ex'n, §§ 81-97; Freeman, Judg. (2d Ed.) §§ 442-450. But the uses of the writ have been very much extended by later statutes in the parent country and in the United States. 12 U. S. Dig. (F. S.) 56; 8 Jac. Fish. Dig. 12025; Tenn. Code, tit. "*Scire Facias*," §§ 2257, 2272, 2855-6, 2987, 3576, 4425. An example of its extended use will be found in *Winder v. Caldwell*, 14 How. 434, where it was employed to enforce a mechanic's lien.

And it will be observed, in reading the law on the subject of the writ, that these statutes and the practice under them have, as a principal object, the simplification of its use and the employment of its functions to meet almost any contingency that may arise requiring notice to parties outside of the record on which it is based that their interests are, or are about to be, or may properly be, affected by the proceeding. It is a very convenient writ, and the tendency to make it serve these purposes has resulted in cutting loose from much of its technical environments in the ancient law. It now accommodates itself to almost any case in which its use is either necessary or desirable.

Still, the statute above referred to, authorizing this and other remedial writs, does not extend to the point of enlarging our jurisdiction by means of the writ to be issued, nor is its use unrestricted by well-defined principles that control the court in determining the rights of the parties. *U. S. v. Plumer*, 3 Cliff. 28.

I have not been able to find and no case has been cited precisely like this, which is not strange, since the circumstances are peculiar, the abolition of one municipal corporation and the substitution of

another in its place being a rare occurrence. But among the very earliest cases are found strong analogies to this case. In *Atkins v. Gardener*, Cro. Jac. 159, a college of physicians in London recovered under a statute a judgment as a penalty against a doctor for practicing physic without a license, the suit being brought in the name of the president of the corporation. He died after judgment, and on *scire facias* to revive the judgment in the name of his *successor* it was contended that the *scire facias* should have been in the name of his *executor* or *administrator*; but the court overruled the objection because the suit was given to the college, and the president having recovered in right of the corporation the law transferred the duty to his successor. 8 Bac. Abr. 600. And, on the other hand, if one have judgment against the vicar, and before execution the vicarage is united to the parsonage, he brings his *scire facias* against the parson. *Dean and Chapter of Litchfield's Case*, 20 Edw. IV. fol. 6, pl. 7; Grant, Corp. 638, 639.

And so the later decisions under statutes giving corporations the right to sue in the name of a public officer for the time being, or in the name of some officer of the company for the time being, whenever by death or otherwise there was a change of officers, and new parties succeeded, the *scire facias* was necessary to bring them to conform the judgment and execution to each other and make the record consistent with itself, because without this consistency the rule was relentless that there could be no execution. Foster, *Scire Facias*, book 2, cc. 1, 2, p. 99; Id. book 1, c. 7, p. 90, and cases cited. The contention was that in such cases the mere suggestion would be sufficient; but it was finally determined that there must be a *scire facias*. The court said, in *Bosanquet v. Ransford*, 11 A. & E. 520; S. C. 2 Q. B. 972: "The uniform course, if new parties are introduced, is by *scire facias*; on suggestion, is applicable to collateral facts affecting the same parties; as, for example, change of name and similar matters." *Cross v. Law*, 6 M. & W. 217; S. C. 8 Dowl. 789; *Harwood v. Law*, 7 M. & W. 206; S. C. 8 Dowl. 904; *Bartlett v. Pentland*, 1 B. & A. 704. In *Webb v. Taylor*, 1 D. & L. 676, *Patterson, J.*, said: "The banking company are in truth the real parties to the suit, and ought to be allowed to make the substitution they propose." Foster, *Scire Facias*, 104.

And so, here, the real party is the municipality of the city we know as Memphis, and its change of name or rehabilitation into a new corporation would seem to be the very case for a *scire facias* to bring

it in; if for no other purpose, to make the record consistent with itself. The statute of Westm. 2, 13 Edw. I. c. 45, gave the *scire facias* for the very purpose of allowing new parties to be introduced into the record; and although in a general way it is usually applied in cases of change of parties by death, marriage, and bankruptcy, it is by no means confined to these changes, but extends to any change whatever. The statement of the rule is: "Whenever it is sought to fix a party on a judgment given against another, it must be done by *scire facias*; the rule being that where a new person, who was not a party to a judgment or recognizance, derives a benefit by or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance." Foster, *Scire Facias*, 6; 2 Inst. 471; *Cross v. Law*, *supra*; *Penoyear v. Brace*, 1 Ld. Raym. 245; *Offut v. Henderson*, Cro. Car. 553; *Brown v. Railroad Co.* 4 FED. REP. 770; *Dibble v. Norton*, 44 Miss. 164; *Shepherd v. Ryan*, 53 Ga. 563.

It is said in *Nat. Bank v. Colby*, 21 Wall. 609, that a corporation dissolved becomes "a defunct institution, and a judgment can be no more rendered against it than could be rendered against a dead man dying *pendente lite*." And further, it was held that it requires legislation to prolong its life for the purposes of continuing suits by or against it. The supreme court of Tennessee has decided that the legislation abolishing the city of Memphis has substituted for it, as its successor, the taxing district of Shelby county, the defendant to this *scire facias*, and that suits may be revived against it. If this be so, judgments may be revived as well under the rules above indicated. *O'Connor v. Memphis*, 6 Lea. 730; *Luehrman v. Memphis*, 2 Lea. 425; *Meriwether v. Garrett*, 102 U. S. 472; Acts of Tennessee, 1879, c. 92, p. 127; Id. c. 15, p. 26. The legislation itself provided that all suits pending should be prosecuted to final determination "without change of parties;" but subsequently, in amending the section containing that provision, it was omitted. Acts of Tennessee, 1879, pp. 26, 104, §§ 5, 14. This makes it at least prudent to proceed by *scire facias*, whether or not mere suggestion would be sufficient. It is settled that because a *scire facias* is unnecessary does not render it invalid. Foster, *Scire Facias*, 87; *Brown v. Railroad Co.* *supra*.

It is argued for the defendant that the only purpose of a *scire facias* is to have execution, and many cases are cited which show that no new judgment can be entered adding interest and costs, but that the judgment only awards execution on the original judgments; and a case under our practice of subjecting land descended to the heir by

scire facias holds that the writ cannot issue unless there be a suggestion on the record that lands have come into the hands of the heir. *Frierson v. Harris*, 5 Cold. 146. This argument is true where the sole purpose is to revive a dormant judgment against the same party, but where a new party is to be introduced into the record the *scire facias* not only performs the function of awarding execution, but of introducing the new party as a party and making the judgment one against him. *Shepherd v. Ryan*, *supra*; *Foster*, *Scire Facias*, 191, notes *p* and *q*. It does not follow because no additional judgment can be entered for interest, as the cases cited for defendant decide, that no more is done than award execution. The object of the writ is to bring the new party into the record as a plaintiff or defendant and to give him an opportunity to make defence against that purpose. The form of the judgment awards execution on the original judgment, to be sure, but in doing this it makes the defendant to the writ a technical party to the judgment. And this class of cases has no analogy whatever, in my judgment, to that of land descended to the heir. The heir is not liable for the debt, but only the property in his hands, *while the successor here is liable* because it is the same debtor under a different name. The defendant's cases do not establish any other doctrine than this. *Payton v. Stuart*, Peck, 156; *Bryant v. Smith*, 7 Cold. 113; *Frierson v. Harris*, 5 Cold. 146; *Anderson v. Clark*, 2 Swan, 158; *Taylor v. Miller*, 2 Lea. 153; *Murray v. Baker*, 5 B. Mon. 172; *Treasurer v. Foster*, 7 Vt. 52; *Hall v. Hall*, 8 Vt. 156; *How v. Codman*, 4 Me. 79; *Tindall v. Carson*, 1 Harr. (N. J.) 94; *Walton v. Vanderhooff*, 1 Pen. (N. J.) 73.

It is also argued for the defendant that inasmuch as the only purpose is to have execution of the assets of the old city, and these assets are being administered under the legislation in the chancery court, there can be no *scire facias*. This seems to me to be the same thing as saying that the court should withhold judgment because the execution will be returned *nulla bona*. But the assumption is not a sound one. The object and effect of the writ is to charge the taxing district as a judgment debtor, bound to satisfy the debts of the municipality. The supreme court of the state has held it to that liability. A judgment is to be satisfied, not only out of existing property, but future acquisitions, and it does not appear but that at some time there may be property subject to execution. And more than this: the state may at some time devolve on the defendant the duty of levying taxes, or collecting taxes to pay this judgment, and under our practice there must be a judgment and *nulla bona* return to

authorize the execution process of *mandamus* to compel the discharge of that duty. It is a right, therefore, of the plaintiff to make the defendant a party to the judgment by this *scire facias*.

Demurrer overruled.

On the coming in of the order a question is made as to its form in awarding judgment. The defendant insists no interest shall be added, and, so far as the entry would compound the interest, this is correct. The order should award execution against the taxing district for the amount of the original judgment and interest, which is, however, to be calculated in the marshal's office, on the execution, as in all cases. Perhaps the common law did not allow interest on judgments, but our statutes do, and this judgment is no exception because it needs revivor by *scire facias*. Rev. St. § 966; Bump, Fed. Proc. 678; Tenn. Code (T. & S. Ed.) § 1948.

HART v. CITY OF NEW ORLEANS.*

(Circuit Court, E. D. Louisiana. May 27, 1882.)

1. EXECUTION OF JUDGMENTS OF UNITED STATES COURTS.

The act No. 5 of the legislature of Louisiana of 1870, which prohibits the issuance of writs of execution and *mandamus* against the city of New Orleans, has no effect as to the remedies or judgments rendered in the federal courts.

Louisiana v. New Orleans, 102 U. S. 203, distinguished.

New Orleans v. Morris, 3 Woods, 115, approved and followed.

2. REVENUE OF MUNICIPAL CORPORATION.

Moneys due the city of New Orleans from the city street railroad companies, as a *bonus* for privileges granted, never were any portion of the regular revenue of the city, but are the purchase price of property which the city has sold, to be paid in instalments, and are dedicated by law to the payment of either the bonded or floating debt of the city. The leasehold interests of the city in the sugar sheds,—that is, her right to receive as rents 10 per centum of the gross amount of receipts of the sugar shed company,—and her right of reversion in the building, stand upon the same footing.

State ex rel. Gas Co. v. New Orleans, 32 La. Ann. 268.

3. LIABILITY OF MUNICIPAL PROPERTY TO SEIZURE FOR DEBT.

The private property of municipal corporations—*i. e.*, that which is not necessary to the performance of the functions of government—may be seized and sold for the payment of debts.

4. BATTURE (OR ALLUVION) PROPERTY.

The city of New Orleans is the owner of the land upon which the sugar sheds are built, *jure alluvionis*. The batture in the locality is her property,

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

and all of it which is not necessary for the purposes of commerce, and for public purposes, she may sell to private individuals, as she has been doing in years past. This is the same batture property which was in issue in *New Orleans v. U. S.* 10 Pet. 662.

On Opposition and Motions to Quash Seizures.

A. G. Brice and *E. H. Farrar*, for plaintiff.

Charles F. Buck, City Attorney, for defendant.

PARDEE, C. J. The plaintiff, having obtained judgment against the defendant, has taken out execution and garnishment process and seized the amounts due from two of the city street railroad companies as a bonus for the privileges granted, and the interest of the city in the sugar-shed warehouses. The judgment obtained is absolute, except a restriction that in case resort is had to court for a *mandamus* to compel the levy of a tax to pay the judgment, regard shall be had to the legislative limitations on taxation during the several years that the obligations upon which the judgment was founded were contracted. The city has taken these proceedings now under consideration, for the purpose of having the seizures set aside.

1. It is claimed that no execution at all can issue upon the judgment, because (1) the judgment is not absolute, and (2) because act No. 5 of 1870, extra session, prohibits the issuing of executions against the city of New Orleans, at least until after certain registry is made of the judgment. The judgment is absolute condemning the city, and it is the settled jurisprudence of this court that act No. 5 of 1870 has no effect as to the remedies or judgment rendered in the federal courts. This has been determined by all three of the judges authorized to hold this court, in as many distinct cases.

The remarks of the supreme court in *Louisiana v. New Orleans*, 102 U. S. 203, to the effect that "so much of said act as requires such filing and registration before a judgment creditor can procure a warrant for the amount due or resort to other means to enforce payment thereof, does not render less effective the pre-existing remedies, and is therefore not in conflict with the contract clause of the constitution," evidently refer to another and distinct question than the practice of the federal courts in aid of judgments rendered by them, and that question was whether the provisions of said act No. 5 impaired the obligations of pre-existing contracts.

The proposition that the legislature of the state of Louisiana can control the execution of judgments in the federal courts in the state involves the very life and jurisdiction of these courts. The one re-

striction of act No. 5 may be reasonable, but how about the rest of the act, which prohibits any execution at all?

Counsel may divide the act and say registration is reasonable, therefore you shall register your judgment; not to have any remedy is unreasonable, therefore you may have execution; but the court cannot so divide the act. We think we must take all or none. If we take all of the act the court can issue neither *mandamus* nor execution against the city in any event, and we would also have to take section 33 of act No. 7, of the same legislature, which provides that the city of New Orleans may have injunctions, appeals, etc., without the affidavits, bonds, or security required from other litigants.

The whole question is very clearly discussed upon principle and authority in the case of *New Orleans v. Morris*, 3 Woods, 115.

2. Because the moneys seized are moneys due the city as a part of the revenue of the corporation, applicable to the current expenses of municipal administration. It is not considered that such sums are now or ever were any portion of the regular revenue of the city, even if the last city budget enumerates them. These sums are the purchase price of property which the city has sold, the same to be paid in instalments. The supreme court of the state has decided that such funds are dedicated by law to the payment of either the bonded or floating debt of the city. See *State ex rel. Gas-light Co. v. New Orleans*, 32 La. Ann. 268.

3. Because the city's interest in the sugar sheds seized and the squares of ground on which the sheds are built are public things, not seizable or alienable as against the city or the public. The leasehold interests of the city in the sugar sheds—that is, her right to receive as rents 10 per cent. of the gross amount of receipts, and her right of reversion in the buildings—stand upon the same footing as the sums due from the street railroads.

As to the ownership or public character of the squares of ground seized there is no distinction between this case and that of *Morris v. New Orleans*, decided by this court and reported in 3 Woods, 115, which it is understood counsel for the city now concede to have been correctly decided, and to be in accordance with the jurisprudence of the state. That case practically decides this, and leaves but little more to be added on the subject.

It is a general principle of law that the private property of municipal corporations—*i. e.*, that which is not necessary to the performance of the functions of government—may be seized and sold for the

payment of debts. See *Holliday v. Frisbie*, 15 Cal. 630; *Davenport v. Ins. Co.* 17 Iowa, 276; *Louisville v. Com.* 1 Duvall, (Ky.) 295; *Dillon, Mun. Corp.* § 446. Such has always been the law of Louisiana. See *Municipality v. Hart*, 6 La. Ann. 570; *McEnery v. Pargoud*, 10 La. Ann. 497; *New Orleans v. Ins. Co.* 23 La. Ann. 61.

The city of New Orleans is the owner of the land upon which the sugar sheds are built, *jure alluvionis*. The batture in the locality is her property, and all of it which is not necessary for the purposes of commerce, and for public purposes, she may sell to private individuals, as the evidence in this case shows she has been doing in the years past. See *Packwood v. Walden*, 7 U. S. 86, and cases cited in 3 Woods, 115. This batture is the same property which was in issue in *New Orleans v. U. S.* 10 Pet. 662. It is to this batture that Gay's refinery, the Bazaar market, and various other pieces of private property belong. Under the laws of the state and the charter of the city, the city has ample power to dispose of this property.

The question now is, "Has the city, by the sugar-shed contracts and other ordinances, destroyed the public servitude which once rested on these squares of ground in favor of everybody?" That is, has not the city, by public act and by her ordinances, voluntarily authorized, as completely as under act No. 133 of 1880 a court could have compelled a corporation to permit, the enjoyment and ownership of a portion of the batture? The exclusive control of that property is vested in the sugar-shed company, and the same is to be conducted as an ordinary public warehouse, for the joint profit of the company and the city. The use of said property is not left to the public, giving every one the "right freely to unload his vessels, to deposit his goods, to dry his nets, and the like." See La. C. Code, arts. 452 to 455.

There is no evidence to show that these squares are necessary for the purpose of commerce. The wharf ordinances define the public landings, and these squares are clearly excluded therefrom—some of them by name. That the city some time in the future may require these squares for public landings is merely to put them in the same category as all the other private property near the river, for that mighty stream frequently goes where it lists.

4. Because act No. 133 of 1880, known as the "syndicate act," turned all the property of the city not required for public purposes over to a syndicate, to be held in trust for the payment of the bonded debt of the city. This proposition is not advanced in the pleadings, and as the syndicate is not before the court claiming anything, it is

not necessary to discuss it further than to express a doubt as to the sufficiency of any such claim, if it shall ever be made.

The opposition should be dismissed, and it is so ordered.

His honor, Judge BILLINGS, concurs in this opinion and judgment.

STEWART v. POTOMAC FERRY Co.

(Circuit Court, E. D. Virginia. March, 1882.)

1. ATTACHMENT OF VESSEL—STATE LAW—CONFLICT WITH JUDICIARY ACT.

A state law which, for a cause of action clearly maritime, either of contract or tort, arising on or committed by a ship engaged in commerce on any public navigable water of the United States, gives a remedy at common law in a state court by attachment *in rem* against the vessel specifically as debtor or offender, is in conflict with section 9 of the judiciary act of 1789, giving exclusive jurisdiction in admiralty and maritime causes to the admiralty courts; and this is so, even though the state law provide that the attachment of the ship be "in a pending suit."

2. ADMIRALTY JURISDICTION—EXCLUSIVE IN THE UNITED STATES COURTS—STATE CANNOT CONFER ON STATE COURTS.

A vessel lien law of a state giving a lien upon any steam-boat or other vessel, raft, or river craft, for materials or supplies furnished to, or for service performed on, or for injury done by, such steam-boat or other vessel; or for wharfage, salvage, pilotage, or claim on contract of transportation due by such steam-boat or other vessel; and authorizing any claimant for such supplies, services, damages or injury, or dues, "in a pending suit," in a court of the state, to sue out an attachment specifically and particularly against "the vessel, her tackle, apparel, and furniture," as the debtor, offender, or tortfeasor, "whether the cause of action arose without or within the state, and whether the owner be resident or not," and before process "in the pending suit" is served, either actually or constructively,—such a law, and any proceeding under it, before service, either actual or constructive, upon the real owner of the vessel, violates the third division of section 711 of the Revised Statutes of the United States, giving cognizance to the United States district courts, exclusive of the state courts, of all civil causes of admiralty and maritime jurisdiction; and this is so, notwithstanding that part of the same provision which "saves to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."

3. COMMON-LAW REMEDIES—NOT ENFORCEABLE—VESSELS ENGAGED IN COMMERCE.

Inasmuch as the rules of decision at common law enforce liens upon property in an order radically different from the order in which admiralty rules of decision enforce them, the common law is not competent to afford a remedy against a vessel engaged in commerce upon the public navigable waters, as between suitors having maritime claims against such vessel.

J. A. Jones, and George Walker, for plaintiff.

R. M. Mayo, for defendant.

HUGHES, D. J. This is an action of trespass on the case, brought to recover \$10,000 damages for a tort, alleged to have been committed by a steam-boat.

The first section of the Virginia attachment law is as follows:

"When any suit is instituted for any debt, or for damages for breach of any contract, on affidavit, stating the amount and justice of the claim; that there is present cause of action therefor; that the defendant, or one of the defendants, is not a resident of this state; and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is; or that he is sued with a defendant residing therein,—the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident for the amount so stated." Virginia Code 1873, c. 148, § 1.

The Virginia vessel lien law, as last amended on March 12, 1878, is as follows:

"If any person has any claim against the master or owner of any steam-boat or other vessel, raft, or river craft, or against any steam-boat or other vessel, raft, or river craft, found within the jurisdiction of this state, for materials or supplies furnished or provided, or for work done for, in, or upon the same, or for wharfage, salvage, or pilotage, or for any contract for transportation of, or any injury done to any person or property by such steam-boat or other vessel, raft, or river craft, or by any person having charge of her, or in her employment, such person shall have a lien upon such steam-boat or other vessel, raft, or river craft for such materials or supplies furnished, work done, or services rendered, wharfage, salvage, pilotage, and for such contract or injury as aforesaid, and may, in a pending suit, sue out of the clerk's office of the circuit court of the county, or of the corporation court, or of the circuit court of the corporation, in which such steam-boat or other vessel, raft, or river craft may be found, an attachment against such steam-boat or other vessel, raft, or river craft, with all her tackle, apparel, furniture, and appurtenances, or against the estate of such master or owners. Any attachment may be sued out under this section for a cause of action that may have arisen without the jurisdiction of this state, as well as within it, if the steam-boat or other vessel, raft, or river craft be within the jurisdiction of this state at the time the attachment is sued out or executed." Virginia Acts of '77-8, p. 217.

The history of this act is of some interest. It has always been, in some form, part of the state attachment law. It originated in a police provision for attaching vessels engaged in harboring, for the purpose of carrying away, runaway slaves. Code of 1860, c. 171, § 5, p. 646. By various amendments it was gradually enlarged and changed until, in 1866, (see Acts of 1865-6, c. 57, p. 171,) it gave a right to proceed in a state court for nearly every subject of admiralty jurisdiction, and continued the right previously given to proceed directly against the vessel as the debtor or offender; the statute itself reciting

that the vessel might be arrested and proceeded against "without the previous institution of any suit," or setting forth the name of the owner. It may be added (what was part of the public history of the times) that in 1866, and for some time, under the ruling of the then judge (Underwood) of the United States courts in this district, none but counsel who could take what was called the *iron-clad oath* were allowed to practice in the federal courts of Virginia; and the vessel lien law of the state was modified in 1866, by an act drawn by a very able lawyer who rested under this political ban, so as to omit the provisions as to runaway slaves, and to give a general jurisdiction over ships, equivalent to the admiralty jurisdiction. Neither in this amending act, nor in any of its predecessors, was the word "lien" employed; the old civil law *privilegium*—that is to say, the right of proceeding against and arresting the ship as herself the contractor or offender—being given in all the previous statutes. But in the final act of March 12, 1878, the words which authorized the proceeding against the vessel, without the previous institution of a suit *in personam* against the owner, were omitted in consequence of what was said *passim* by the district judge of this district in the case of *The Raleigh, Cannon, and Astoria*, 2 Hughes, 50-53, and of certain decisions of the supreme court of the United States hereafter mentioned, and a *lien* was given by name against vessels.

In this condition of the law the present suit was instituted in the circuit court of Westmoreland county, Virginia, on the thirtieth of September, 1880. The plaintiff had taken passage on the steamer Arrowsmith at the city of Washington, on the twenty-sixth of August, 1880, for Nomini, Virginia, and, while the vessel was still at the wharf at Washington, had been injured by the falling of a block of ice. The damages claimed are \$10,000. There has been no service of process on the defendant, who is alleged in the declaration to be the owner of the steamer. On the same day on which the suit was begun, process of attachment was taken out against the steamer by name, the defendant being declared in the plaintiff's affidavit to be a non-resident. Process of attachment was immediately served, and the vessel arrested and held. She was thereupon bonded in the sum of \$20,000. The attachment was not taken out under the general attachment law of Virginia, section 1, c. 148, of the Code, before quoted, which gives the right of attaching the "estate" of defendant, but was taken out under the vessel lien law, also before quoted.

The affidavit on which the attachment issues sets out in terms that the injury complained of was done to plaintiff while a passenger

by persons having charge of the said steamer Arrowsmith. The sheriff was not required by the process in the cause to levy the attachment upon any "estate" of the defendant to be found within the said county of Westmoreland, but was directed to attach "the said steamer Arrowsmith, with all her tackle, apparel, and furniture, for the said amount of \$10,000." Some days after the vessel was attached and bonded, an order of publication was made against the defendant company, as a non-resident, and in due course thereafter publication was made. The defendant was never served with process. On the fourteenth day of April, 1881, the defendant appeared in the state court by counsel, and on its petition the cause was removed into this court.

The defendant then filed here a demurrer, and alleges, as ground of demurrer, that the court has not jurisdiction of the cause in a proceeding at common law; this being essentially an admiralty cause, exclusively cognizable in an admiralty court.

It is plain, as well from the affidavit on which the attachment was issued and the terms of the attachment as from the concessions of plaintiff's counsel, that this is a proceeding under what is called "The Vessel Lien Law," (quoted in the foregoing statement of facts,) and not under the foreign attachment law of Virginia. Since the decision of the United States supreme court in *Steam-boat Co. v. Chase*, 16 Wall. 522, common-law suits are maintainable against ships of commerce for causes of action arising at common law. A state has power to annex to suits for such causes of action auxiliary remedies, like foreign attachment, for the purpose of subjecting property of non-residents to the payment of debts due her own citizens. *Pennoyer v. Neff*, 95 U. S. 714. A statute, therefore, which gives a right to attach any property of a non-resident to satisfy a judgment when obtained is valid; and, under such a law, creating a remedy by attachment against all the property of a non-resident, in an action for a common-law tort already pending, a ship may, as the law stands at present, under the rulings of the supreme court of the United States, be attached as part of the estate of the owner defendant. But can a state give a special lien upon a ship for a cause of action peculiarly of admiralty cognizance, and provide a remedy by attachment for its enforcement specifically and directly against the particular vessel as a debtor or offender? That is the question on which this case turns.

The supreme court has decided, in the cases of *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 565; and *The Belfast*, 7 Wall. 624, that states cannot give their courts the right to proceed against

vessels *in rem* for maritime causes of action. In consequence of those decisions, and one of the district court of this district, already cited, the legislature of Virginia, by the act of 1878, merely struck out from the vessel lien law, as it stands in section 5, in the 148th chapter of the Code of 1873, the language which gave the right to proceed against the vessel by name for admiralty causes of action; re-enacted it, gave a lien *in ipsissimis verbis* on the specific vessel, and provided for its enforcement by an attachment directed specifically and exclusively against the vessel as debtor or tort-feasor. It is true that the suit must now be brought against owners, real or fictitious, by name; but in no other respect are the proceedings altered. Plainly, all this was a mere evasion, contrived after the decisions referred to. The proceedings under the present law are, substantially, a libel *in rem* and *in personam* in admiralty.

The distinctive feature of an admiralty suit is that the *privilegium*, or right to pursue the particular ship, exists independently of possession, and exists only against the particular vessel on, or on account of, which the cause of action arose, which, in the eye of the admiralty law, is the real contracting debtor or offender, the real defendant.

It seems to me, therefore, that a statute which gives a lien on that specific vessel for that admiralty cause of action, and attempts to confer the right of enforcing it on a state court, comes within the reason of the cases above cited, even though the suit is, in form, against the owners nominally and the vessel really. The form cannot change the substance. In this case, for instance, the fact that the owners are named as defendants instead of the vessel, makes no real difference in the proceeding. They are not served personally with process. They can be brought into court only by an order of publication, precisely similar to that made in an admiralty cause, giving notice of seizure. The judgment, while in form against them personally, is yet enforced only by a sale of the vessel, or execution against the stipulators who stand for her. Can a suitor, then, be allowed to evade the decisions of the supreme court by merely altering the title of the case?

Where non-resident ship-owners are defendants, the right to proceed in the state courts against their vessels in admiralty causes of action, if it existed, would be a peculiar hardship. Unlike admiralty courts, which are always open for business, most of the state circuit courts are held only twice a year, and last but a short time. Being strangers, non-residents cannot often give the release bonds, with

large penalties, required by the state attachment laws. Their witnesses, being seamen, never remain long in one place, and hence their ships would be tied up idle for months, at a heavy expense, awaiting a distant term, with the probability of losing all their witnesses before the term begins. Continuances and new trials would make matters still worse. Besides all this, local juries are proverbially hostile to strangers, and it is natural that non-residents and mariners should be averse to running the hazard of their verdicts. Apprehensions of such delays and hazards are very prevalent among the masters and owners of shipping, and instances have come to my knowledge in which vessels have been attached in state courts for groundless claims, the suitors calculating that the vessels would pay the demand rather than be tied up for an indefinite period, awaiting the result of litigation in an unfamiliar tribunal.

There are still stronger reasons why admiralty causes should not be tried by common-law methods, and admiralty claims subjected to common-law rules of decision. I do not think the framers of the judiciary act of 1789, by the clause in the ninth section "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it,"* intended to provide that admiralty causes might be tried in common-law courts in every case in which the subject of admiralty jurisdiction could be reached by common-law process, and the issues of fact and law arising in them could be tried under the common-law practice.

The constitution of the United States entitles the owners, navigators, employes, and commercial creditors of ships to have their rights determined by the rules of decision, and adjudicated by the expeditious methods obtaining in the admiralty courts; and the peculiar character, equities, and priorities of these claims are such that it is necessary, not only for the purposes of justice between man and man, but to the interests of commerce, that they should be so determined and adjudicated.

A ship is a thing that must be kept going, in order to subserve the objects for which she is built and employed. To arrest and hold her idle is to destroy her life. She is essentially a voyager. The interests of all connected with her voyages require that the priorities of the claimants and creditors should be the reverse of those which are recognized by common-law courts as applicable to things on land. The seaman is paid first. The material man, who supplies

*Now third clause of section 711 of the Revised Statutes.

or repairs the ship in equipping her for her voyage, is paid next; and, as between different material men, he who furnishes supplies or repairs at a later stage of the voyage, takes precedence of him who does so at an earlier stage. In general, the mortgagor, having a debt against the vessel, comes in behind other creditors holding maritime claims, and stands only in the shoes of the owner. Credit is given to the ship herself as the responsible debtor, and a wanderer and stranger; the owner being in general, and in the first instance, unknown to the creditor and ignored by the law. These are but a few of the rules of decision distinguishing the adjudications of the admiralty from those of the common-law courts.

Now it is plain that in cases in which the rights of suitors depend upon the admiralty law, the common law, whose rules of decision are in a great class of cases violently the reverse of those obtaining in the admiralty courts, is incompetent to afford the remedies contemplated by the ninth section of the law of 1789.

In a large number of cases an admiralty suit is in the nature of a creditors' bill in equity, in which the ship has to be sold and the claims of creditors marshalled and adjusted according to priorities observed and respected in all the admiralty courts of the world, in respect to ships. Can it be pretended that a suit at common law, commenced by attachment and order of publication against a non-resident owner, in a jurisdiction in which the ship is a stranger, and the rest of its creditors non-resident, is one in which the common-law practice and the common-law rules of decision are competent to the ends of complete justice? The proposition would seem to be little less than preposterous.

Suppose there be claims of seamen, material men, salvors, ship's husbands, and others existing against the vessel which has been arrested in the present suit, (and, for all we can know from this proceeding, there are such claims,) the claimants all having constitutional title to an adjudication of their rights in an admiralty proceeding, according to admiralty rules of decision; what would become of them in the present suit at common law, pending between no other possible parties than the plaintiff and the owner? The claims of the persons having primary rights in the vessel are not before the court, and cannot, by any legal possibility, be brought here in the present suit. It is not sufficient to answer that judgment in this case would not reach this particular vessel, which is bonded; for that is only to assert that by fortuitous circumstances this particular vessel has had the narrow chance to escape the injurious and unjust consequences.

of this sort of suit. Nor would it be sufficient, if this vessel had not been bonded, but were still in custody of the court, to assert that the sale of her under execution at common law would convey to the purchaser only such title as a common-law court could give, and would leave her still subject, in the hands of her purchaser, to all outstanding maritime claims; for the vessel would have been in custody of the court awaiting the recurrence of rule-days and terms, and the delays of plenary proceedings, for nearly two years since its arrest, during which her seamen would, in all probability, have been scattered to the ends of the earth, and the material men of other ports, who had supplied her on short credit with things needful to keep her moving, would have been waiting in vain for payment. To have postponed the claims of those two classes of men for 18 months and more, would have been a denial of justice. Plainly, the common-law remedy, applying the rules of common-law decision to ships and their creditors, cannot but be prejudicial to the great interests of commerce, and to the rights of all persons connected with the navigation of ships.

The judicial history of the United States proves that the admiralty law and the admiralty practice are absolute necessities to the commerce of the country.

At one time, owing to a series of decisions rendered by the supreme court of the United States, all that very large portion of the Union not bordering upon or penetrated by tide-waters was deprived of this law and practice, and the deprivation was felt so keenly that very remarkable things occurred.

In a series of cases, among them *The Thomas Jefferson*, 10 Wheat. 428, and *The Orleans*, 11 Pet. 175, the supreme court held that the admiralty jurisdiction of the United States courts embraced only the tide-waters of the country, and, by so ruling, virtually excluded it from the regions watered by the great lakes of the north, and by the Mississippi river and its tributaries. The need of this jurisdiction was, in consequence, so severely felt by the commerce of those great regions that congress found it necessary to pass the act of February 26, 1845, "extending the jurisdiction of the United States district courts to certain cases upon the lakes and the navigable waters connecting the same." This law virtually erected the district courts of the United States, in districts bordering on the waters named, into *quasi* admiralty courts. It expressly provided that the practice and proceedings *in rem* obtaining in admiralty courts should be employed in the district courts in respect to vessels exceeding a certain ton-

nage, and that the maritime law and the rules of decision observed in admiralty courts should be applied to vessels navigating the lakes and waters connecting them. This act of congress could, of course, have no operation in respect to vessels navigating interior waters other than those of the lakes and their connecting streams, and failed to reach the needs of the commerce of all the other waters of the Mississippi valley. This defect was supplied by state legislation; all, or nearly all, of the states penetrated or bordered by those other waters passing laws authorizing their own courts to adopt and employ, to a greater or less extent, the practice of admiralty courts, and to deal with the vessels navigating them according to admiralty rules of decision. While these things were going on the views of the supreme court of the United States, in respect to the extent of the admiralty jurisdiction, underwent a change; and in the case of *The Genesee Chief*, 12 How. 457, that court reversed its former ruling and held that *navigability*, and not the *ebb and flow of the tide*, was the test of the presence of that jurisdiction. After this ruling it followed, as a logical consequence, that the court would also have to rule that the admiralty jurisdiction extended *proprio vigore* to the northern lakes, and to the rivers of the Mississippi valley; that it extended there by virtue of the constitution of the Union, and not by virtue of the congressional act of February 26, 1845, or of the statutes of the states relating to vessels, which have been mentioned. Moreover, that this jurisdiction was exclusively in the courts of the United States, and that all state legislation conferring the jurisdiction upon state courts was unconstitutional. All this, accordingly, that court has subsequently decided; as, for instance, in the cases of *The Magnolia*, 20 How. 296; *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; and *Ins. Co. v. Dunham*, 11 Wall. 1.

This very cursory view of the course of legislation and adjudication on this subject shows that the admiralty law and practice—that is to say, the admiralty jurisprudence—is a necessity to the commerce of the country; that it cannot be dispensed with in regard to vessels employed upon the public navigable waters of the United States; that the courts of the Union and of the several states are bound to regard navigators of, and all persons interested in, ships, either in the character of owners, employes, or creditors, as entitled to the benefit of that jurisprudence; and that any state legislation designed directly, specifically, and particularly, to subject ships as such, and as debtors or offenders, to common-law procedure and common-law rules of decis-

ion, for maritime causes of action, is in necessary conflict with the constitutional provision and the congressional legislation giving to the United States courts exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, and tends to work incalculable injustice to the classes interested in shipping.

Indeed, the necessity of resort to admiralty rules of decision in respect to things requiring constant outlays of labor and money in order to be rendered useful for the purposes for which they exist, has not limited itself to ships. It has recently extended itself to embrace railroads. The supreme court of the United States, in the recent cases of *Fosdick v. Schall*, 99 U. S. 235; *Hale v. Frost*, Id. 389; and other decisions, have found it necessary to relax the common-law principles of priority among creditors, and to apply to railroads principles assimilated to those of the admiralty law. In the former case it said:

"The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate in order that bonded interest may be paid, and disastrous foreclosure postponed, if not altogether avoided.

"In this way the daily and monthly expenses are kept from those to whom in equity they belong, and used to pay the mortgage debt. * * * Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts, before he has any claim upon the income. * * * When a receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of the funds, would have been paid in the ordinary course of business."

Thus the tendency of modern jurisprudence is very strongly towards a departure from the rigid and inelastic tenets and methods of the common law, in respect, at least, to the instruments and instrumentalities of trade and commerce; and I think the time is not far distant when the supreme court of the United States will find it necessary to hold that the attachment laws of states, allowing attachments *in rem* to be served on the general estates of defendants in pending suits, shall not be construed to embrace, in suits brought for causes of action clearly maritime, steam-boats, ships, and other vessels act-

ually engaged in the carrying trade on the public navigable waters of the United States covered by the admiralty jurisdiction.

It only remains for me to notice a few of the cases cited by plaintiffs' counsel in their brief, touching, apparently, this very point. In the case of the *Steam-boat Co. v. Chase*, 16 Wall. 522, there were two questions: (1) Whether a personal representative of an intestate (who had been run over and drowned by a large steam-boat) could bring suit in admiralty for the tort; the general rule being that claims for tort die with the claimant, and there being a state statute in Rhode Island, where the accident occurred, giving the right of action in a common-law proceeding to the representative of such an intestate. (2) If there were no right of action in admiralty, then the second question was: Whether, admiralty having no jurisdiction of the cause of action, a proceeding at common law in the state court, as this suit was, under the state statute, and an attachment of the steam-boat under the general attachment law of the state, was an interference with the exclusive jurisdiction of the admiralty courts in maritime causes of action. The supreme court held that this suit could be maintained in the state court, and that the attachment of the vessel was valid. That case, it is obvious, differs essentially from the one at bar. In that case both parties were residents of Rhode Island.

In the case of *Leon v. Galceran*, 11 Wall. 187, a state statute of Louisiana gave a right of attachment, called, in the local nomenclature, "a writ of sequestration," in certain cases, against the estate and property of a defendant, irrespectively of whether the plaintiff's claim was maritime or not. It was a statute similar in character to the general attachment law of Virginia, (chapter 148, § 1, of the Code,) which was quoted in the statement of facts prefixed to this opinion. The plaintiffs were seamen, who sued for wages earned on board of a schooner of the defendant employed on the Mississippi river in Louisiana, all being residents of the state, and probably of the city of New Orleans, where the suit was brought. The action was *in personam* against a defendant who also was a resident of Louisiana, and the schooner was attached, on mesne process, under the general attachment law which has been described. It was stated by plaintiffs' counsel in his brief in the supreme court of the United States, to which the case was carried from the state courts, that "the writ of sequestration [used in Louisiana] has no analogy whatever with the admiralty process, as understood and defined by writers on admiralty law;" and he cites article 269 *et seq.* of the Louisiana Code

of Practice, which is not before me. The suit, therefore, was like an ordinary suit at common law between residents, in which, under a general attachment law, the property attached was a schooner of the defendant. The case, apparently, is a strong one for the plaintiff in the present suit; but it differs essentially from it in the particulars about to be named.

We are considering here a law of Virginia which, in its original form, gave a *privilegium* in admiralty, and a proceeding *in rem* against a ship as such, for all maritime claims, although no suit *in personam* had been instituted, and irrespective of ownership. This law having been pronounced, in the respects indicated, unconstitutional, was then changed, but changed only to the extent of providing that the proceeding *in rem*, though still taken out against the ship as debtor or tort-feasor, should be "in a pending suit."

I do not think so slight an amendment has rectified the inherent illegality of the statute. I do not think a state statute, giving for a maritime cause of action a proceeding *in rem* specifically against a ship as the debtor or offender, is valid, in view of the third classification of causes in section 711 of the Revised Statutes of the United States, giving cognizance to the admiralty courts, exclusive of the state courts, "of all civil causes of maritime and admiralty jurisdiction." I think the suit must be dismissed for want of jurisdiction.

As to the proposition of plaintiff's counsel that the defendant cannot raise the question of jurisdiction by demurrer, I have to say that however that might be in respect to other defects of jurisdiction, yet when the nature of the action is such that the court is incompetent to try it, then no formal plea to the jurisdiction is necessary; and whenever on any pleading the court is brought to the knowledge of the absence of its jurisdiction of the case, the court may *ex mero motu*, or on simple motion of either party, dismiss the proceeding. Moreover, it is elementary law that a demurrer brings the whole record before the court antecedent to the demurrer, and so the demurrer in this case is equivalent to a motion to dismiss. The suit must be dismissed.

NEW ORLEANS CITY R. CO. v. CRESCENT CITY R. CO.

(Circuit Court, E. D. Louisiana. June, 1881.)

1. NEW ORLEANS—STREETS—EXCLUSIVE RIGHTS TO STREET RAILWAYS.

The city of New Orleans has no power under its charter and the laws of Louisiana to grant to a street railroad company the sole and exclusive right to the use of the public streets of the city for a street railroad.

2. SAME—ESTOPPEL BY FORMER CONTRACT.

When the city of New Orleans has made a contract granting to a street railroad company certain franchises to run and maintain a railroad, and binds herself not to grant similar franchises over the same streets to any other company or person during the period of said contract, she is not thereby estopped from granting to others the privilege of running lines across any of the streets mentioned in the contract, nor for such short distances along such streets necessary to make connections and turn-outs for other lines running mainly along other streets and between entirely different *termini*.

In Equity. Application to dissolve injunction.

Carleton Hunt, for complainant.

John M. Bonner, for defendant.

PARDEE, C. J. The injunction in this case was obtained in the state court *ex parte*, on the petition, affidavits, and exhibits. The removal of the cause to this court brings the injunction along. On the motion to dissolve, the case stands substantially as though an interim order had been granted, and the question now is whether or not to grant the injunction. In this light I consider the case.

1. The contract of the New Orleans City Railroad Company with the city of New Orleans, passed October 2, 1879, gives the said company no right to any privilege on Camp street between Felicity and Calliope streets. No such privilege is included in the advertisement, ordinances, specifications, or contract. The court can take no judicial notice of the necessary lines and connections of a street railroad running under contract rights obtained from a municipal corporation. The court must be controlled by the evidence, and the parties must stand on their contract.

2. The city of New Orleans had no power under its charter and the laws of Louisiana to grant the New Orleans City Railroad Company the exclusive and sole right to the use of public streets of the city for a street railroad.

3. Where, in a contract granting by the city of New Orleans to a street railroad company a franchise to run and maintain a street railroad, there is this provision: "The city of New Orleans binds

*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

herself not to grant, during the period for which said franchises are sold, a right of way to any other railroad company upon the streets through which said right of way is hereby sold, unless by mutual agreement between the city and the purchaser or purchasers of these franchises;"—the city is not thereby estopped from granting to other railroad companies the privilege of running lines across any of the streets mentioned in the contract, nor for such short distances along such streets where it may be deemed necessary to make connections and turn-outs for other lines running mainly along other streets and between entirely different *termini*.

4. It seems to me that the extreme effect that can be given to the provision just recited would be to hold that the grantee would be entitled to recover from the city any damages resulting to the grantee from concessions of right of way to other railroad companies upon the streets enumerated.

The authorities cited in defendant's brief cover all these points.* *Brown v. Duplessis*, 14 La. Ann. 842, relied upon by petitioner, does not conflict.

Let the injunction in this case be dissolved as improvidently issued.

See same case, 5 FED. REP. 160.

JOHN HAYS & Co. v. THE PENNSYLVANIA Co.†

(Circuit Court, N. D. Ohio. June, 1882.)

1. RAILROADS — DISCRIMINATIONS IN RATES BASED ON AMOUNT OF FREIGHT SHIPPED.

Discriminations in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum.

Nicholson v. G. W. R. Co. 5 C. B. (N. S.) 436, distinguished.

2. SAME—CASE STATED.

The plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent on the defendant for trans-

* *Brown v. Duplessis*, 14 La. Ann. 842; *Logan v. Pine*, 43 Iowa, 524; *Red. Railw.* pp. 313, 317, 318, §§ 8, 10, 12; *Smith v. St. R. Co.* 29 Ohio St. 295, 305, 306, 308; 45 Barb. 133; 50 Barb. 286, 309.

† Reported by J. C. Harper, Esq., of the Cincinnati bar.

portation. The regular tariff between those points was \$1.60 per ton, with a rebate of from 30 to 70 cents per ton to persons shipping over 5,000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess of tariff paid by plaintiffs, *held*, that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon.

Motion for New Trial. The facts appear in the opinion.

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville, and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was \$1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to-wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at \$4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is

the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an

inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of *Nicholson v. G. W. R. Co.* 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully-loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully-loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the

railroad of £40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully-loaded trains, at the rate of seven trains per week. It was in consideration of these obligations—which, in the judgment of the court, enabled the railroad company to perform the service at less expense—the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully-loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such

enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

NOTE. It is not a legitimate ground for giving a preference to one of the customers of a railway company that he engages to employ other lines of the company for the carriage of traffic distinct from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not to bind himself to employ the company in other and totally distinct business, the advantage of carrying goods to other points not affecting the cost of carriage between the particular points, [London and Bristol.] *Baxendale v. G. W. Ry. Co.* 5 C. B. (N. S.) *309. For a recent construction of the English

statutes prohibiting unreasonable discriminations in railroad rates, see *G. W. Ry. Co. v. Sutton*, L. R. 4 Eng. & Irish App. 226, in which all the earlier cases are collected. A contract by a railroad company to deliver all grain shipped in bulk over its road to a particular warehouse, is void as against persons not parties to it. *C. & N. W. Ry. Co. v. People*, 56 Ill. 365. Where grain had been shipped to Chicago, the company will not be permitted to charge one rate to one warehouse and a different rate to another in that city. *Vincent v. C. & A. R. Co.* 49 Ill. 33. An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others, is void as creating an illegal preference. *Messenger v. Penn. Co.* 36 N. J. Law, 407.

The express company cases, recently decided at St. Louis by Justice Miller, have perhaps gone as far as any cases yet decided in compelling railroad companies to afford all persons the equal use of their facilities. There it was held that a railroad company was not only bound to carry the goods, but was bound to furnish special cars for that purpose, to permit an express messenger to accompany and have charge of the goods, and that in case of dispute as to rates it was for the court to determine what was a reasonable rate. *Southern Express Co. v. St. L., etc., Ry. Co.* 10 FED. REP. 210, 869. For other cases to the effect that railroad companies must afford all persons or companies engaged in the express business equal and impartial facilities, see *Texas Exp. Co. v. Tex. & Pac. Ry. Co.* 6 FED. REP. 426; *Southern Exp. Co. v. Memphis, etc., R. R.*, 13 Cent. Law. J. 68; 12 Rep. 193; 8 FED. REP. 799; *Sandford v. Railroad Co.* 24 Pa. St. 378; *N. Eng. Exp. Co. v. Me. Cent. R. Co.* 57 Me. 188; *McDuffee v. Portland & Roch. R. Co.* 52 N. H. 430.—[REP.]

McCAN, Assignee, v. E. CONERY & SON.*

(Circuit Court, E. D. Louisiana. May 8, 1882.)

LIMITATIONS IN BANKRUPTCY.

The pendency of a suit in chancery between the same parties on the same cause of action, which suit is afterwards dismissed for want of equity, does not interrupt or suspend the prescription or limitation provided by section 5057 of the Revised Statutes, and a subsequent action at law cannot be maintained by the assignee, instituted within two years after the dismissal of such chancery suit without prejudice, if it be instituted more than two years after the cause of action accrued to the assignee.

On Writ of Error to District Court in Bankruptcy.

Joseph P. Hornor and W. S. Benedict, for complainant.

Charles B. Singleton, R. H. Browne, John H. Kennard, W. W. Howe, S. S. Prentiss, and H. H. Walsh, for defendants.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE, C. J. This case is brought to this court on a writ of error to the district court taken by the defendants, who were condemned in that court in the sum of \$2,500, with interest and costs. The petition was filed June 28, 1880, the plaintiff, McCan, averring that he qualified as assignee in bankruptcy of one Montgomery on the fifth of April, 1876. The cause of action is stated to be against the defendants, Conery & Son, as sureties on the charter of the steamboat Seminole, from Montgomery to one Mitchell and others, in 1875, the cause of action accruing to Montgomery in June of that year, and accruing to and vesting in the plaintiff assignee on the fifth of April, 1876. It is further stated in the petition that, prior to plaintiff's election as assignee of Montgomery, certain creditors of Montgomery filed a bill in equity in the district court on their own behalf, and on behalf of all the creditors of Montgomery, for the preservation of the property of the bankrupt's estate, and other reasons, against Montgomery and a pretended transferee, and against said charterers, and Conery & Son as sureties, praying, among other things, for a judgment against Conery & Son for \$2,500, as sureties on the charter-party, the breach of which was set forth. Also that plaintiff, after his qualification as assignee of Montgomery, caused himself to be substituted as party plaintiff, in place of the complaining creditors, and thereafter prosecuted the said suit; that said Conery & Son appeared and defended the said suit, which, after various proceedings, was dismissed as to said Conery & Son. The record shows that the dismissal was on May 27, 1880, and was for want of equity, and without prejudice.

The defendants appeared to defend this case, and filed the plea of prescription of two years, under the bankrupt act of 1867, (Rev. St. § 5057,) which provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when such cause of action accrued for or against such assignee." This plea was tried before a jury, and under the charge of the court was overruled by verdict. To the charges and refusals to charge of the judge three several bills of exception were taken. The defendants then answered, denying liability as sureties, because of breach of warranty as to seaworthiness of the Seminole, and a failure to comply with a condition precedent as to the adjustment of loss or damages within the time stipulated in the contract of suretyship.

On the trial, verdict was rendered against Conery & Son for the full amount claimed, counsel taking nine other bills of exception to the charges and refusals to charge the jury. In this court the following are the errors assigned:

(1) That the court below erred in its rulings on the question of prescription or limitation of two years, as more fully set forth in the three bills of exception, pages 40, 51, of the transcript.

(2) That the court erred in its rulings on the trial upon the merits of the case, as set forth in the nine bills of exception respectively found at pages 73 to 116 of the transcript.

(3) That the court erred in refusing a new trial as set forth, etc.

The first and second bills of exception show that the judge, on the trial of the plea before the jury, refused to instruct the jury that in a suit brought by an assignee in bankruptcy against a person having an adverse interest touching any property or right of property transferable to or vested in such assignee, the limitation of two years provided in section 5057, Rev. St., is absolute, and with no exception but in cases of fraud. The third bill shows that the judge did instruct the jury, on the trial of the plea of limitation of the action, as follows:

"If the jury find that an action for the recovery of the same thing which is here demanded was instituted by a creditor of P. C. Montgomery, and upon the appointment of the assignee (the plaintiff herein) he made himself a party plaintiff to that suit, which was diligently prosecuted in this court, and upon appeal in the circuit court of this district, as appears by the record, Nos. 10,830, and 9,093 on the dockets of the district and circuit courts of this district; and if they further find that by a final decision in the circuit court, rendered upon such appeal, said suit was dismissed on the ground that it was not an equity suit, and that this suit was instituted within two years from the rendition of such decree,—then the jury will find for the plaintiff upon the exception."

The question raised by these three bills of exception, and the assignment of errors thereon, is whether the pendency of a suit in chancery between the same parties on the same cause of action, which suit is afterwards dismissed for want of equity, interrupts or suspends the prescription or limitation provided by section 5057 of the Revised Statutes; so that an action at law may be maintained by the assignee within two years after the dismissal of such chancery suit, and more than two years after the cause of action accrued to the assignee. If yes, the judge's charge and refusals to charge were correct. If no, then the instructions given were erroneous, and the jury were misled thereby on the trial of the exception of limitation. The

language of the statute makes no exception for any reason whatever. And this is explained and justified by the supreme court in the case of *Bailey v. Glover*, 21 Wall. 342.

The only exception that the courts have ever made, so far as I have been furnished with authorities, to the absolute terms of the statute, is on equitable principles in cases of concealed fraud.

In *Bailey v. Glover*, just cited, it is said:

"We hold that when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by or becomes known to the party suing, or those in privity with him."

The reasoning in the same case shows that no other exception can be made.

Of course the legislation of the various states, in regard to the interruption or suspension, cannot apply, the whole matter being within the control of congress. See *Peiper v. Hanner*, 5 N. B. R. 252. The limitation of the statute applies to all claims. See, also, *Gucister v. Sevier*, 33 Ark. 522; *Norton v. De Lavillebeuve*, 1 Woods, 163; *Payson v. Coffin*, 4 Dill. 386; *Walker v. Towner*, Id. 167; *Foreman v. Bigelow*, 18 N. B. R. 457.

The question in this case is then reduced to this: Whether the state of facts, as shown in the record and bills of exception, make such a case as, according to authority and the jurisprudence of the country, would interrupt the prescription fixed by the statute. The case made is where the assignee is diligently prosecuting his case to the best ability of his counsel, but in the wrong court, and he has been guilty of no negligence.

In *Harris v. Dennis* we find that "if an action on the case be brought within the limitation, and after the expiration thereof the plaintiff be nonsuited, the limitation act is a good plea to another action for the same cause." And this, too, when the statute provides an exception in favor of plaintiffs whose judgments are reversed for error, allowing a new action to be brought within one year. *Roland v. Logan*, 1 Serg. & R. 236.

"The provision in the statute of limitations, which authorizes a plaintiff to commence a new action within a year after the reversal of a judgment in his favor, etc., notwithstanding the time specified as a bar has elapsed during the pendency of the suit, will not authorize the institution of an action at law under similar circumstances after the dismissal of a bill in chancery touching the same subject-matter." 18 Ala. 307.

"Under the act of congress, 1841, limiting suits by or against assignees or bankrupts to two years after cause of action accrued, a bill filed after two years cannot be regarded as an amendment to one of the same cause of action filed before the expiration of the two years, but dismissed by the court." *Clark v. Hackett*, 1 Cliff. 270.

In *Barker v. Millard*, where the holder of a note was stayed by injunction from prosecuting the same, he was not allowed to plead the time he was so enjoined as an interruption of the statute. 16 Wend. 572.

Gray v. Berryman, 4 Mumf. (Va.) 181, seems to be identical with the case under consideration. There it was held: "If a bill in chancery be dismissed on the ground that the plaintiff's case is exclusively cognizable at law, he cannot plead the pendency of such suit in chancery to prevent the act of limitations from being a bar to his subsequent recovery at law." To the same purpose see *Callis v. Woddy*, 2 Mumf. 511; *Donnell v. Gatchell*, 38 Me. 217; *Cogdell v. Exurn*, 10 N. B. R. 327; *Bank v. Sherman*, 101 U. S. 405.

In *Baily v. Glover*, *supra*, it is said:

"It is obviously one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution.

"The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within 10 days, and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who administer the law could be induced to act upon its spirit, it would do much to make the statute more acceptable than it is. But, instead of this, the inferior courts are filled with suits by or against assignees, each of whom, as soon as appointed, retains an attorney, if property enough comes into his hands to pay one, and then, instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation and the fees of officers who execute the law.

"To prevent this as much as possible, congress has said to the assignee, 'You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you.'"

From these authorities, and the arguments in support of them, it seems clear to me, upon both principle and authority, that the matters set out by plaintiff in this case, as shown by the record, do not, and ought not to, interrupt the prescription or limitation fixed by the statute for actions brought by or against an assignee in bankruptcy.

From this view, the charge of the judge to the jury, on the trial of the exception, was erroneous, and must be so adjudged. The questions raised by the other bills of exception need not be considered, as the case must be reversed and remanded.

Let a judgment be entered in this cause reversing the judgments rendered in the district court on the merits, and on the exception of prescription, and the verdicts of the juries rendered therein, and remanding the cause to the said district court, with directions to the district court to award another trial on the exception of prescription, or limitation of the action.

STERLING and others v. BARNWELL & GAYNOR, Assignees, and others.*

(Circuit Court, M. D. Alabama. May, 1882.)

LIMITATION IN BANKRUPTCY.

The pendency of a previous suit, either at law or in equity, will not interrupt the running of the limitation fixed by section 5057 of the Revised Statutes, when the same is pleaded in a subsequent suit between the same parties for the same cause of action, although said subsequent suit be instituted within two years of the rendition of the final judgment in the previous suit.

McCan v. Conery, ante, 315, followed.

Clopton & Brooks, for complainants.

Troy & Tomkins, for defendant Gaynor.

PARDEE, C. J. Complainants' bill shows that February 5, 1873, and prior thereto, one Robert W. Smith was seized and possessed of certain real estate, situate in the city of Selma, state of Alabama, and on that day, with his wife, granted and released and quitclaimed said real estate to one Cary W. Butt in trust, however, for the use and benefit of said Robert W. Smith and one Charles Walsh; that by said deed no duty was imposed upon, and no right or power over said estate conferred upon, said Butt, and that said Butt never exercised any control or possession over said property; that said Smith and Walsh were members of the copartnership of Walsh, Smith & Co., of the city of Mobile, Alabama, and that on the thirty-first of August, 1873, the said firm being indebted to one Edwin W. Glover in a large sum, exceeding \$20,000, a contract was entered into between Walsh and Smith of the one part, and Glover of the other part, selling to Glover, in extinguishment of \$20,000 of said indebtedness, the said

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

real estate, and agreeing to execute a good and sufficient deed in fee-simple, and that on said day the said Butt, at the request of said Walsh and Smith, made and executed, acknowledged and delivered, a deed in writing conveying to said Glover all his right and title in and to said real estate, which was accepted by said Glover under the impression that it was a good and sufficient legal title to the said estate; that afterwards the said Glover died, leaving a will devising the estate aforesaid to the present complainants, who, after due probate of the said will in July, 1874, soon after entered into the possession and control of said estate by agents and tenants, and ever since have been and still are in the possession thereof; that on June 12, 1874, upon the petition of a creditor, the said firm of Walsh, Smith & Co., and the individual members thereof, were adjudged bankrupts, and on October 6, 1874, said Henry Barnwell and John C. Gaynor were appointed assignees, and by conveyance by the register became vested as assignees of all the estate, real and personal, of said firm, including all property of whatever kind of which they were possessed, or in which they, as partners and individuals, were interested or entitled to have on the third day of June, 1874; that on October 4, 1876, the said Barnwell and Gaynor, as said assignees, instituted in the United States district court of this district a suit against certain persons, tenants of complainants, to recover possession and rents of said estate; that complainant Amanda A. Sterling was admitted a party to such suit, and defended the same, and that at the November term, 1877, the said assignees recovered a verdict and judgment for the possession of said land, and the sum of \$528.97 as damages for the detention thereof and costs of suit; that December 19, 1877, judgment was rendered in accordance with said verdict by said district court, whereupon a writ of error was sued out of the circuit court of this district from said judgment, which was afterwards heard, and on May 13, 1880, the judgment of the district court was affirmed, on the ground, as complainants are informed and believe, that the legal title, which alone was considered in a court of law, was never in the said Butt, but vested, by the statute of uses of the state of Alabama, in the said Walsh and Smith immediately upon the execution of said deed by Robert W. Smith and wife to said Butt, as trustee, and that the legal title vested in said assignees upon the assignment of bankruptcy; that the complainants have a complete and perfect equitable title in said estate, and are entitled to the use

and enjoyment, rents and profits, of the same; and that the said assignees hold the legal title in trust for complainants. The bill further shows that the said assignees are about to execute the said judgment of the district court for the possession of said property, and damages; and the complainants pray a decree divesting the legal title out of said assignees and vesting the same in complainants, and they pray for an injunction *pendente lite* against the judgment of the district court aforesaid, to be perpetuated at the final hearing.

This bill was filed August 1, 1881, and the same day an order for injunction was granted upon giving bond for \$3,000. August 9, 1881, an amended bill was filed showing that Glover was put in possession of said real estate immediately after the execution of the deed to him, and so remained in possession until his death; and further, that the defendants, taking advantage of the delay necessary for the complainants to give the bond required for the injunction, and in order to defeat the same, had executed by writ of possession the aforesaid judgment, and evicted complainants from the possession of said real estate. This amended bill is not sworn to and contains no prayer.

An injunction bond was filed October 24, 1881, but no injunction appears to have been issued. Subpoenas were issued October 24, 1881, and appear to have been served October 26th, following. Defendant Gaynor has appeared and filed a demurrer on the ground that the suit is barred by the limitation of the bankrupt law, (section 5057, Rev. St.) which provides:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

This demurrer has been submitted, together with a motion to issue an injunction restoring the property to the condition existing when the original bill was filed.

The first question presented is on the demurrer, and is as to the applicability of the statute of limitations.

"If the declaration shows that the cause of action is barred by the statute of limitations, the defendant may demur." *Morris v. Collins*, 13 Ala. 388.

The bill in this case is brought to perfect the title to real estate, to divest the legal title from the defendant's assignees, and invest it in

the complainants. The injunction prayed for is incidental to this action, and, of course, falls without the main action is sustained.

The action is a suit in equity brought against an assignee in bankruptcy, by persons claiming an adverse interest touching property and rights of property vested in such assignees, and from the statements of the bill more than two years have elapsed since the cause of action accrued against said assignee. The case, then, comes clearly within the terms of the statute, and the action is barred unless the case can be brought under some exception to the statute, or the statute can otherwise be avoided. The terms of the statute are absolute. The supreme court has only allowed cases of concealed fraud to interrupt the statute. *Bailey v. Glover*, 21 Wall. 342, and such cases, are allowed more on the theory that the action does not accrue in cases of fraud until the fraud is discovered, than that there is any actual interruption to the running of the limitation. In the case of *McCan v. Conery*, 11 FED. REP. 747, it has been held that the pendency of a suit in chancery between the same parties for the same cause of action, which is dismissed without prejudice for want of equity, will not interrupt the statute, and that an action at law was barred by the expiration of two years. See *ante*, 315, and authorities cited in that case.

Counsel in argument have claimed that, as complainants have been in possession—adverse possession—of the property, no cause of action accrued to them which they were obliged to bring until their possession was disturbed, and as the action is brought within two years from the affirmance of the judgment of the district court, they are within the two years required by the statute. To this it would seem sufficient to reply, the suit you have brought is one that you could have brought over seven years ago; that you had notice that such an action would be necessary nearly five years ago, when the district court rendered the judgment against you which you now ask to enjoin; and as we have seen that your action is one against an assignee touching the property of the bankrupt, and claiming an interest adverse to said assignee, the statute of limitations of such actions has been running against you, certainly from the date of the judgment of the district court declaring you not the owner nor entitled to the possession or rents of the said real estate, and such judgment was rendered against you and became final and executory more than two years before the present action was instituted.

Counsel have cited the case of *Banks v. Ogden*, 2 Wall. 58, but on examination of that case I fail to see that it has any application

here. That was a case where, after the bankruptcy, the defendant took possession of property belonging to the bankrupt estate. The supreme court held, on the plea of the statute of limitations of two years, that "the limitation cannot affect any suit, the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession."

It seems to me that the only theory of this case upon which the complainants' counsel can base an argument, even, avoiding the application of the statute, is that this is a suit brought to enjoin the execution of a judgment at law, and therefore is not an original suit, but a continuation of the suit already instituted, (see *Jones v. Andrews*, 10 Wall. 333,) and as this suit is brought within two years from the rendition of the judgment of the circuit court in the original case, the statute is not applicable. This argument, and the strong equities disclosed by the bill, have had great weight with me in reaching a conclusion in this case, but the difficulties in the way can hardly be overcome.

In the first place, this is not a suit solely to enjoin the execution of a judgment at law, but is a suit with many new parties on both sides to perfect an equitable title to real estate, with an injunction as incidental thereto.

In the next place, the judgment at law here sought incidentally to be enjoined was rendered, as the bill shows, more than two years before the filing of this bill; for the judgment in the case at law is the judgment of the district court rendered and becoming final in 1877, more than three years before the institution of this suit.

The writ of error sued out from that judgment operated *no superseas*, and the complainants' cause of action certainly had accrued when that judgment became final. The injunction sought could have been obtained notwithstanding the pendency of the writ of error. See *Parker v. Judges*, 12 Wheat. 561.

The circumstances disclosed by the bill show a strong case for the exercise of the equitable jurisdiction of the court, but they also show the wisdom of the law-making branch of the government in providing the limitation for suits by or against assignees in bankruptcy touching the property surrendered by the bankrupt.

The bill shows a case where the adjudication in bankruptcy was in 1874, and now, in 1882, eight years after, \$20,000 worth of the property surrendered is to be launched on the sea of chancery to reach port at some remote time in the future unless the statute of

limitations prevents. I am forced to the conclusion that the statute should and does prevent.

Let judgment be entered sustaining the demurrer to the bill, and dismissing the bill, with costs, as to said Gaynor, assignee.

In re J. C. WARD & Co., Bankrupts.

(District Court, W. D. Tennessee. May 11, 1882.)

1. BANKRUPTCY—CREDITORS' PETITION—DORMANT PARTNER—COMMENCEMENT OF PROCEEDING.

Where an involuntary petition was filed against two persons as partners, and subsequently an amended petition was filed against a third person as a dormant partner, *held* that, as to the proof of individual debts against the dormant partner, the date of the amended petition must be taken as the commencement of the proceedings in bankruptcy against him, and not the date of the original petition by relation.

2. SAME—PROOF OF DEBTS—WHEN PROVABLE.

Section 19 of the original act of 1867 (14 St. at Large, 525) made the time of the adjudication the decisive time when the debt must be then existing to be provable, but section 5067 of the Revised Statutes has changed it to the time of the commencement of the proceedings in bankruptcy, and therefore no debt created subsequently to the date of the petition can be now proved against the estate of the bankrupt.

3. SAME—ATTORNEY'S FEES.

The fees of an attorney for resisting an involuntary adjudication and preparing the schedules cannot be proven as a debt against the bankrupt unless the retainer was prior to the date of the filing of the bankruptcy petition; nor can they be now allowed as costs against the estate.

Myers & Sneed and Calvin F. Vance, for creditors.

Estes & Ellett, contra.

HAMMOND, D. J. The register has overruled exceptions to the claim for the attorney's fee for professional services for resisting the decree of adjudication of one of the bankrupts, and by consent the validity of his action in allowing the claim is submitted to the court informally as if properly presented under rule 34 and the practice of the court.

An involuntary petition was filed by creditors against J. C. Ward and J. F. Holst, as partners, and they were adjudicated bankrupts without contest. Subsequently, it being claimed that Mrs. Margaret Holst was a partner in the firm, a supplemental petition was filed against her. She denied being a partner, but on the trial of the

issue it was decided against her, and she was adjudicated. *Re Ward*, 7 Rep. (Boston,) 136; 25 Int. Rev. Rec. 289.

For their services in that behalf her attorneys have proved their claim against her estate, and demand payment as individual creditors of their *pro rata* share of her assets, and it is this claim which other creditors oppose. They contend that even if the time of adjudication is to be taken as that by which the provability of a debt is to be determined, that being a member of the firm of J. C. Ward & Co. the adjudication of Mrs. Holst must relate back to that of the adjudication of the firm, or the filing of the original petition in bankruptcy, and that this is a subsequently-accruing debt which cannot be proven.

In *Sherman v. International Bank*, 8 Biss. 371, it was held that an amendment of the petition related back to the commencement of the original proceeding, but the court was careful to observe that there might be circumstances where this doctrine of relation should not be applied, and it is manifest that this must be so. The commencement of proceedings is the most important point of time in the whole bankruptcy system, and has an immense bearing on the rights of all the parties. Here was an unknown partner—one held to be a partner under the law of the case, perhaps against her own will, or at least against her own knowledge—who was not originally proceeded against, and the question is whether the date of the petition against her is to control in determining the rights of the parties interested, or, by relation, that of the original proceeding against the firm.

However it may be as to firm assets and firm creditors, and rights growing out of the proceeding in its relation to the title of the assignee to property involved, either firm property or her individual property, and as to which I do not now express any opinion, it is quite clear that for the purposes of this controversy over an individual claim against her the date of the petition against her is the point of time when the proceeding must be taken to have been commenced. Without elaborating the question it is obvious that this is in accordance with all the analogies of the law in cases where the doctrine of relation applies to commencement of suits, services of process, and the like.

Under section 19 of the original bankrupt act it was provided "that all debts due and payable at the time of the adjudication of bankruptcy, and all debts then existing, etc., may be proved against the estate of the bankrupt." 14 St. at Large, 525. There was a conflict in the courts as to the proper construction of this section. In

the case of the *New York Mail Steam-ship Co.* 2 N. B. R. 554,—a case precisely like this, and on the authority of which, no doubt, the register allowed this claim,—it was held that the fee was provable against the estate, because it existed at the date of the adjudication, and all claims then existing were provable. This construction was followed in *Re Hennocksburgh*, 7 N. B. R. 37; S. C. 6 Ben. 150; and, perhaps, in other cases. But in *Re Crawford*, 3 N. B. R. 698, and in *Re Nounnan*, 7 N. B. R. 15, 22, the correctness of this construction, notwithstanding the plain language of the statute, was denied on grounds that are not without great force. But since these decisions the language of the statute has been changed, no doubt to settle the conflict, and since the amendments of 1874 the section has been made to read thus: "All debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy, and all debts then existing, etc., may be proved against the estate of the bankrupt." Rev. St. § 5067. And it is imperatively provided that "no debts other than those specified in the five preceding sections shall be proved or allowed against the estate." Rev. St. § 5072. This must settle this controversy in favor of the objecting creditors, and the claim must be disallowed, unless the retainer was prior to the date of the petition against Mrs. Holst.

The old cases allowed a reasonable compensation to both the attorney for the petitioning creditor and the resisting bankrupt out of the fund, particularly where the latter's services were beneficial to the estate; but this practice was designedly abrogated by a rule of the supreme court, and it is not claimed by counsel in this case. *Re Lloyd*, 7 FED. REP. 459, was the case of a claim for services to the petitioning creditor, but it applies as well to the rule that allowed the resisting bankrupt for counsel fees, as both stood on the same footing. See cases in note appended.

Disallow the claim.

This case being again sent to the register, the attorneys proved that they were, in fact, retained prior to the filing of the bankruptcy petition against Mrs. Holst, and thereupon the register allowed their claim, which, on exceptions, the court sustained, saying: "When this case was before heard, it occurred to me as highly probable that the retainer was prior to the filing of the amended petition, inasmuch as Mrs. Holst's connection with the bankrupt firm was established on the peculiar facts developed on the trial of that issue, and I had that state of the case in my mind upon that investigation, and came to

the conclusion that if the contract for services in defending it was made prior to filing the amended petition against her, it would be provable. I have not a doubt, on this proof, that such was the fact, and the action of the register in allowing the claim will be sustained."

May 24, 1882.

HAMMOND, J.

NOTE. Consult Bump, Bky. (10th Ed.) 82, 572. and notes; *Re Patterson*, 1 N. B. R. 125; *Re Williams*, 2 N. B. R. 229; *Re Williams*, Id. 83; *Re Bigelow*, Id. 371; *Re Waite*, Id. 452; *Re Schwab*, Id. 488; *Re Montgomery*, 3 N. B. R. 137; *Re Brown*, Id. 584; *Re New York Mail Steam-ship Co.* Id. 627; *Re Sawyer*, 5 N. B. R. 54; *Re Comstock*, Id. 191; *Re Jaycox*, 7 N. B. R. 140, 142; *Re Riggs*, 8 N. B. R. 90, 92; *Re Andrews*, 11 N. B. R. 59; *Re Portsmouth Savings Society*, Id. 303; *Re Riker*, 18 N. B. R. 393; *Re Orne*, 1 N. B. R. 57; S. C. 1 Ben. 361; *Re Bigelow*, 3 Ben. 146; *Re Bruce*, 6 Ben. 515; *Re May*, 7 Ben. 231; *Re Hamburger*, 8 Ben. 189; *Re Hatje*, 6 Biss. 436; *Triplett v. Hanley*, 1 Dill. 217; *Re Commercial Bulletin Co.* 2 Woods, 220; *Bailey v. Loeb*, Id. 573; *Wylie v. Smith*, Id. 673.

MACKAYE v. MALLORY.

MALLORY v. MACKAYE.

(Circuit Court, S. D. New York. May 11, 1882.)

1. COPYRIGHT AND INVENTION—TRANSFER—EMPLOYMENT OF AUTHOR AND INVENTOR—RIGHTS UNDER CONTRACT.

Plaintiff engaged his services to defendant for a period of ten years as an author and inventor, and stipulated that the property in his productions should belong exclusively to defendant, including his time and services, in consideration of \$5,000, to be paid to him annually, and certain other contingent provisions as to compensation. *Held*, that such a contract, and the transfer to defendant made in pursuance thereof, invested defendant with the exclusive property in the play copyrighted, and in the patented invention of the plaintiff contemplated in the terms of the engagement or contract.

2. SAME—TITLE—RIGHT TO USE OF.

In such a contract there is no condition precedent or subsequent which can be invoked to defeat defendant's title or reinvest plaintiff with any interest in the property, nor can he interfere with defendant's use of the property by injunction, or against defendant's wishes to use them himself.

Scudder & Carter, for M. H. Mallory.

W. F. Scott and F. N. Bangs, for Mackaye.

WALLACE, C. J. The parties seek each to restrain the other by a preliminary injunction from exhibiting the play copyrighted by the title of Hazel Kirke, and from employing the mechanical device known as the "double stage," secured by letters patent of the United States.

Each founds his claim to relief upon an agreement made between them in July, 1879, which agreement each party insists has been violated by the other. By that agreement Mackaye engaged his services to Mallory for the period of 10 years, as author and inventor, and stipulated that the property in his productions, and all the income and receipts arising therefrom, should belong exclusively to Mallory. He further agreed that his time and services, as such author and inventor, should belong exclusively to Mallory, and should be devoted in such manner as Mallory might direct, and that he would not use or permit any person to use any play, dramatic work, or invention produced by him without the consent of Mallory. Mallory, on his part, agreed to pay Mackaye an annual salary of \$5,000, and after the profits from the dramatic enterprises in which Mackaye's services should be employed by Mallory should reimburse Mallory's expenditures, and \$30,000 in addition; this salary was to be increased by a sum equal to one-fourth of the annual profits. The agreement also provided that Mallory should have the right to terminate the contract at the termination of any one year of the contract period; but if so terminated, then Mallory should pay Mackaye one-fourth of the cash earnings which might have then accrued, after reimbursing Mallory for his expenditures and interest thereon. It was also a condition of the contract that the sums thus to be paid should be received by Mackaye as full compensation for all copyrights, inventions, royalties, income, and receipts.

Proceeding under this contract, Mackaye produced the play of Hazel Kirke, and obtained a copyright for it, and invented and obtained letters patent for the device of the double stage, and assigned the copyright and letters patent to Mallory, while Mallory upon his part expended large sums of money in theater property, and in the current expenses of the presentation and performance of Hazel Kirke, and received large returns from the exhibition of the drama. After the expiration of the first year of the contract, Mackaye insisted that Mallory should furnish him with a statement of accounts; and September 1, 1880, Mallory furnished to Mackaye a memorandum showing receipts amounting to \$102,858. Thereupon differences arose between the parties. It is only necessary for present purposes to refer to those which relate to the correctness and fairness of the accounts kept by Mallory, and as to those it is sufficient to say that the merits of the controversy cannot be satisfactorily determined upon the affidavits read, and should not be adjudicated upon this motion.

The controversy upon the statement thus made is sufficiently presented to exhibit the legal and equitable rights of the parties so far as they are to be determined now. It may be that upon accounting a larger sum will be found to be Mackaye's just proportion of the profits than Mallory assumes to be due to him; but the court cannot make a new contract in substitution of the one which the parties made for themselves. That contract, as well as the transfers made in pursuance of it, invested Mallory with the exclusive property in the play and in the patented invention. He was at liberty from the outset to use the drama and the patented device as he saw fit. He had the legal right to give them away or to consign them to obscurity. His contract with Mackaye was to pay the latter a fixed sum by way of salary, and a further contingent sum, the amount of which was to depend solely upon Mallory's option. Undoubtedly, Mackaye expected that Mallory would so employ the property that both parties would profit by it; but the contract carefully excludes the former from any right to insist upon the fulfilment of such an expectation. There is no condition precedent or subsequent, in the contract, which can be invoked to defeat Mallory's title, or reinvest Mackaye with any interest in the property. If Mallory has refused to perform on his part those conditions of the contract that were to be performed subsequently, Mackaye's remedy is by his action for damages. The nature of the property transferred by the contract does not modify the legal rights of the parties. It is not material that its value is difficult to estimate, or that it was the production of intellectual effort. It suffices that Mackaye's right to the compensation under the agreement rests in covenant, for the breach of which he has a remedy upon the contract. He cannot reinvest himself with the title of the property he transferred. *Hartshorn v. Day*, 19 How. 211. As Mackaye has no interest in the drama or the patent, but only in the profits which may arise from Mallory's use of them according to the latter's discretion, Mackaye cannot interfere with Mallory's use of them by an injunction, and cannot be permitted, against Mallory's wishes, to use them himself.

An injunction is granted to Mallory and denied to Mackaye.

THE MONTE A.

(District Court, S. D. New York. June 6, 1882.)

1. ADMIRALTY JURISDICTION—MARITIME CONTRACTS—AFFREIGHTMENT.

Charter-parties and contracts of affreightment are maritime contracts, and, by their subject-matter, within the admiralty jurisdiction.

2. SAME—BREACH OF—ACTIONS ON.

For the breach of such contracts, if wholly executory, and no part of the performance of the contract has been entered upon, no maritime lien exists upon the vessel, and an action *in rem* will not lie, but only an action *in personam*, against the master or owners.

3. ACTIONS—JOINDER OF—RULE 46—PRACTICE.

Under rule 46 of the supreme court rules in admiralty an action *in rem* may be joined with an action *in personam* against the master or owners for breaches of contracts of affreightment or charter-parties. The same is true in other cases not expressly provided for under the supreme court rules in accordance with the prior and subsequent practice of the district courts.

4. PRACTICE—AMENDMENT OF LIBEL.

In cases where such actions may be conjoined in the same libel, if the action be improperly brought *in rem*, *held*, that the court has jurisdiction of the subject-matter of the controversy and of the proceeding, and that it is competent for the court to permit an amendment of the libel praying process and judgment *in personam* against the owner after he has appeared and contested the suit *in rem* upon the merits, there being no change in the subject-matter of the controversy; and the court should permit such an amendment, if desired, where much testimony has been taken upon the merits in the proceeding *in rem*, when the latter will not lie for want of a lien.

5. SAME—JUDGMENTS—IN PERSONAM.

A judgment *in personam* cannot ordinarily be entered in a suit *in rem* except upon amendment and the issue of new process *in personam*, or the general appearance of the owner *in personam*.

6. SAME—AMENDMENTS.

A general appearance in an action *in rem* is limited by the nature of the action and the property seized.

7. CHARTER-PARTY—ACTION—PRACTICE—COSTS.

Where the *Monte A.* had been chartered to the libellant to proceed to Baltimore to take a cargo, but subsequently refused to go there, and the libellant thereupon sued *in rem* for damages, and the libel showed such refusal on its face, and the owner appeared and answered upon the merits, denying the alleged charter-party, but not objecting to the form of the action, and testimony was taken upon the merits, and after two years, upon the calling of the case on the calendar for hearing, the objection to the form of the action was first taken, the vessel having been bonded at the commencement of the action, *held*, that the objection that there was no lien on the vessel, and that the action *in rem* would not lie, was not waived; that no decree *in rem* could be pronounced, and that the sureties on the bond must be held discharged. *Held, also*, that the libellant should have leave to amend the libel by inserting a prayer for further process and judgment *in personam*, and thereupon the cause might be further heard on the proofs already taken, and such additional proofs as might be desired; costs not allowed, the objection being unreasonably delayed.

The libel in this case was filed against the *Monte A. in rem* to recover damages for the breach of an alleged contract of charter-party, whereby the owners agreed with the libellant that the *Monte A.*, then on her way to Europe, should, upon her return, proceed to Baltimore to carry a cargo of grain for the libellant. Upon her return the vessel did not proceed to Baltimore, her owners denying that any valid contract with the charterer had been executed. The vessel was arrested at the commencement of this action, and was released upon the usual bond, with sureties, under the act of March 3, 1847. The libel averred, in general terms, the jurisdiction of this court. The answer contained no specific denial of jurisdiction, but denied the making of the charter-party and any damages resulting from its alleged breach. Considerable testimony was taken by deposition, and after the cause had been pending for about two years, when called for trial the claimants for the first time objected to the jurisdiction of the court on the ground that it appeared on the face of the libel that the contract of charter-party was wholly executory, and that no lien upon the vessel, therefore, existed for any breach of the contract, even if made as alleged. On the part of the libellant it was claimed that a lien existed though the contract was wholly executory, but if not, that the objection was waived by not being pleaded, and by the litigation upon the merits of the cause without objection. The residue of the evidence was taken, reserving the question of jurisdiction.

Salomon & Dulon, for libellant.

Lorenzo Ullo, for claimant.

BROWN, D. J. The action in this case is brought for the breach of a contract of charter-party wholly executory. The vessel never entered upon the performance of the contract or of any part of it. In such cases it has been repeatedly declared by the supreme court that no lien exists upon the vessel. *The Freeman*, 18 How. 182; *The Yankee Blade*, 19 How. 82; *The Keokuk*, 9 Wall. 517, 519. The point has been directly adjudicated in several cases in this court and in other courts, and libels *in rem* dismissed upon that ground. *The General Sheridan*, 2 Ben. 294; *The William Fletcher*, 8 Ben. 537; *The Pauline*, 1 Biss. 390; *The Hermitage*, 4 Blatchf. 474.

In the recent case of *The Ira Chaffee*, 2 FED. REP. 401, the learned judge of the district court of the eastern district of Michigan has carefully reviewed the authorities, arriving at the same conclusion, and pointing out its conformity to the general maritime law. The considerations in favor of such a lien, expressed in the cases of

The Flash, Abb. Adm. 67, and *The Pacific*, 1 Blatchf. 569, must be deemed overruled by these subsequent decisions.

There being, therefore, no lien upon the vessel, there is no foundation for a decree *in rem* against her. Delay in presenting the objection cannot, therefore, affect the question; for the want of any lien appears upon the face of the pleadings, since the libel asserts that the vessel never entered upon the performance of any part of the charter-party. The proofs confirm it, and the answer itself expressly admits it; claiming, however, a dismissal of the libel on the ground that the alleged charter-party was wholly unauthorized and void; and the record itself, therefore, would show any decree *in rem* against the vessel to be erroneous. As the vessel cannot be held, the sureties in the bond executed for her release, which stands merely as a substitute for the vessel, are also necessarily discharged. *The Fidelity*, 16 Blatchf. 569, 576.

As the owner of the vessel, however, is a non-resident, who appeared generally in the action and contested his liability upon the merits, without taking any exception to the form of remedy, as he might and should have done at the commencement of the action, (*The Warren*, 2 Ben. 498; *The Bilboa*, Lush. 149; *The Sultan*, 1 Swab. 509; Id. 496, 428; *The Great Eastern*, L. R. 1 Ad. & E. 384; *The Sylph*, L. R. 2 Ad. & E. 24;) and as the situation as respects him, after the release of the vessel on bond, is claimed to be essentially the same as if the action had been commenced *in personam*, it is urged that if he is found clearly liable for the damages alleged in the libel, a personal judgment against him ought to be rendered.

The ordinary practice in admiralty does not permit a personal judgment to be entered upon a mere libel *in rem*. In the case of *118 Sticks of Timber*, 10 Ben. 86, a personal judgment against the claimant was rendered under circumstances altogether exceptional. The libel was filed against the timber, a part of the cargo, to recover freight and demurrage under an agreement with the consignee. The timber libelled had been delivered to the consignee and sold to a third person with the assent of the libellants, so that his lien was lost. A libel was afterwards filed against it *in rem*. The consignee, who had no longer any interest in the timber, voluntarily appeared as claimant, gave a stipulation for its release, and, by his answer, admitted his liability for the freight and demurrage claimed, except as to the mode of computing the amount of freight under the contract set forth in the libel. A personal decree was allowed by *Benedict, J.*, for the damage admitted, and for the freight as adjudged by him, without interest or costs.

The question has usually arisen where the property libelled and sold is found insufficient to satisfy the decree *in rem*, and application has been made for a personal judgment for the deficiency against the claimant, who had contested the suit and was himself liable for the demand. In the case of *The Triune*, 3 Hagg. 117, such relief was allowed. A contrary rule was, however, soon afterwards established in the English practice by two adjudications of Dr. Lushington; first, in the case of *The Hope*, 1 W. Rob. 155, and afterwards in the case of *The Volant*, Id. 383. In the case of *The Hope* he says:

"Looking to the general principles upon which the proceedings in this court are conducted, it is, I apprehend, wholly incompetent for the court to engraft a personal claim against the master as part owner of this vessel upon the proceedings which have already taken place in this cause. It may be true, as stated, that the proceeds of the *Hope* will prove inadequate to answer the full amount of the damage which the owners of the *Nelson* have sustained. If so, it is undoubtedly a hardship upon these owners; but this circumstance will not entitle me to exercise a jurisdiction in their behalf which, according to my own impression, I clearly do not possess. I am not aware of any case in which this court, in a proceeding of this kind, has ever engrafted upon it a further proceeding against the owners, upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage pronounced for."

Two years afterwards, in the case of *The Volant*, *supra*, the subject was reconsidered by the same eminent authority, and the same conclusion reached; overruling the case of *The Triune* in that particular, (3 Hagg. 117.)

In denying the application for a personal decree for the deficiency he says:

"Where there is an appearance to the action, and bail given, as to the bail the decree cannot be extended beyond what they, who are strangers to the cause, have voluntarily made themselves responsible for; but in a case where the owner has appeared the question is to what extent he has appeared to the process against the ship. It is material to see how that process is worded: 'It decrees the ship to be seized, and it cites all persons having, or pretending to have, any right, title, or interest therein to appear in this court, on certain days and hours, there to answer in a cause civil and maritime.' The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel, and not further. Now, if it were possible, on such warrant, to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no reason why bail should not be commensurate with the damage, where the amount is not restricted by statute; but if bail could not be demanded beyond the value of the ship, I do not see how the owners, in that proceeding, can be made further responsible. The

warrant of arrest is confined to the ship; it goes no further. It appears to me, therefore, that there is no personal liability beyond the value of the ship; for this obvious reason, that the original process would not justify any such proceeding. The appearance given by the individual himself would not justify such proceeding; he has appeared only to protect his interest in the ship."

Such is now the established practice in the English admiralty, (see *The Wild Ranger*, 1 Br. & L. 84; Will. & B. Adm. Pr. 67; Boyd, Adm. (1868) p. 33; Coutte, Adm. Pr. 8;) and the same view is expressed in the revised edition of Conkling, Adm. Pr. vol. 2, p. 265.

In the present case the claimant, the owner of the vessel, resides in Italy, and has never been personally within the jurisdiction of the court. His appearance in this case was an appearance *in invitum*, upon an arrest of his vessel, which I am obliged to hold was unauthorized. It would be unjust, as it seems to me, to hold that a foreign owner shall not appear in court to reclaim his property as against an unauthorized seizure without necessarily subjecting himself to liability to a personal judgment, against which he has never been cited to defend; and yet that must be the necessary result if it be admissible to turn a suit *in rem* into a suit *in personam* by amendment, without any further service of process and without the claimant's consent. In actions at common law, and in actions in admiralty *in personam* a general appearance, though it cannot cure any essential defect of jurisdiction of the subject-matter, (*Cutler v. Rae*, 7 How. 729, 731; *The Louisa*, 1 Brow. & L. 59; *The Elenore*, Id. 185; *The Ida*, Lush. 6,) cures any irregularities in the service of process, or even the want of any service. *Atkins v. Disintegrating Co.* 18 Wall. 272; *Wheelock v. Lee*, 74 N. Y. 495, 498; *The Roslyn*, 9 Ben. 119, 129; *Pixley v. Winchell*, 7 Cow. 366.

In these cases, the action being general against the person, a general appearance is co-extensive with the nature of the action. But even in such actions, where the defendant's person or property has been arrested or attached irregularly, the defendant may appear specially to vacate the proceedings, and the court will not acquire thereby any jurisdiction to proceed to a personal judgment. *Sanford v. Chase*, 3 Cow. 381; *Seaver v. Robinson*, 3 Duer, 622; *Brett v. Brown*, 13 Abb. (N. S.) 295; *Manice v. Gould*, 1 Abb. (N. S.) 255. But an action purely *in rem* is itself limited to a proceeding against the *res*, and a general appearance in such an action should, it seems to me, be deemed no more general than the limited nature and scope of the action itself, and of no greater effect than a special appearance to vacate an unauthorized arrest or attachment upon a general suit *in personam*.

No judgment *in personam* can, therefore, be allowed in this case, except through some amendment of the proceedings which it is competent for the court to grant, and upon due notice or citation which shall preserve the essential rights of the parties.

I have no doubt that an action *in personam* would lie in admiralty upon the facts in this case. The charter-party or contract of affreightment was a contract for a maritime service. The libellant's cause of action for the breach of it was, therefore, by its subject-matter, within the jurisdiction of the admiralty, although, for want of any lien upon the vessel, his remedy was *in personam* against the owners and not *in rem*. *Morewood v. Enequist*, 23 How. 491, 493; *Oakes v. Richardson*, 2 Low. 173; *Maury v. Culliford*, 10 FED. REP. 388.

The libel *in rem* is dismissed as against the vessel, not strictly speaking for any want of jurisdiction in the court, but for a mistake in the form of remedy demanded. The subject-matter of the controversy, the parties, and the property are all within the jurisdiction of the court; and this court is not only competent, but it is the appropriate court, to pass upon the questions involved; and the libel as respects the vessel is dismissed because the court adjudges that no lien upon the vessel existed.

In a common-law action of libel, if the defamatory words set forth in the declaration were held not to constitute in law a libel, and the complaint were thereupon dismissed, it would not be said that the court had not jurisdiction of the action; and so if it should appear that the libellous words were only spoken by the defendant, and not written or published. If, pending proceedings upon a libel *in rem*, the property seized were sold as perishable, though the libel might be afterwards dismissed on the ground that no lien existed, as in this case, it could not be held, I think, that the proceeding was beyond the jurisdiction of the court, so as to impair the purchaser's title. *Elliott v. Peirsol*, 1 Pet. 328, 340; *Lavin v. Emigrant Bank*, 1 FED. REP. 657, 666; and, if within the jurisdiction of the court, then it is competent to amend the proceeding.

The libel in this case, for a breach of contract of affreightment, might have been framed both against the owner *in personam* and against the vessel *in rem*. It was the practice in this court, long before the adoption of the supreme court rules in admiralty, to conjoin these remedies in cases of charter-party and affreightment. Those rules, while providing for the joinder of remedies in regard to various other subjects, do not provide for this; and under rule 46 it is, therefore, left subject to the regulation of the several district and

circuit courts; and the former practice of joining these remedies in this class of cases exists in this district, as well as in other districts, the same as before. *The Zenobia*, 1 Abb. Adm. 48; *The Shand*, 10 Ben. 294; *The Keokuk*, 9 Wall. 517; *The Clatsop Chief*, 8 FED. REP. 164.

The pleadings in this case contain all the requisite allegations for the full hearing and determination upon the merits of the owner's liability as in a suit *in personam*. The only thing wanting is a prayer in the libel for a monition and personal judgment against him. An amendment to this effect is no change in the substantial cause of action, but only in the relief demanded. As both modes of relief might have been sought in the same libel, it seems to me that it is clearly within the power of the court to permit an amendment by adding such a prayer for relief *in personam*, and for a monition against the owner.

In the case of *The Zenobia*, above cited, *Betts, J.*, says:

"The party directly liable upon the claim chargeable upon the vessel may in this court be joined with the ship in one suit, and a decree may be prayed and taken against him *in uno flatu* with that against the vessel. Or, for want of a prayer to that effect at the initiation of the suit, the libel may be amended by inserting it, even after decree *in rem* rendered, if that decree proves fruitless to the libellant, and if the party sought to be personally charged has appeared and contested the suit. The expense and delay of two or three actions, requiring to be disposed of upon identically the same pleadings and proofs, are thus saved the creditors, and the association of remedies promotes the simplicity and celerity so much sought for and favored in admiralty procedure."

In his work on practice, also, (*Betts, Adm. Pr. 99.*) he says:

"The practice of this court is not to render a decree *in personam* on a libel *in rem*, but if the case proved shows a clear right to a recovery against the person, whether the action *in rem* is sustainable or not, the libellant will be permitted after decree to introduce the proper allegations *in personam*, and proceed thereon. Care will, however, be taken that no surprise or advantage is allowed against the defendant, by means of such change of the direction of the action. Full notice must be given him of the change of proceedings, and although his appearance in the action *in rem* places him so within the jurisdiction of the court as to authorize it to mould the action conformably to the justice of the case, his stipulators will not be bound for any act or proceedings out of the suit *in rem*. So, also, if the defendant does not appear to answer or contest the action in its direction *in personam*, like proceedings must be taken to bring home notice to him, as on an original institution of a suit. After such steps have been taken the court will hear and adjudicate the matter upon the proofs already before it, or upon the hearing of such further evidence as either party may be allowed, on motion or petition, to introduce."

And this practice seems to be approved by *Curtis, J.*, in the case of *The Enterprise*, 2 Curt. 317, 319.

Such an amendment could not, however, be allowed in cases where, under the admiralty rules, both remedies could not be conjoined in the same libel, (*The Zodiac*, 5 FED. REP. 220, 223;) nor where the subject-matter of the original libel is wholly beyond the jurisdiction of the admiralty. *The S. C. Ives*, Newb. 205, 214; *Ward v. Thompson*, Id. 95; 22 How. 330.

The practice above indicated by Judge Betts is not inharmonious with the decisions in the cases of *The Hope* and *The Volant*, above cited. It does not permit judgment *in personam* upon a mere citation *in rem*, but it permits an amendment to the libel by adding a prayer for judgment against a contesting owner, and it preserves the proofs already taken for subsequent use in the cause. This may often be a consideration of great importance to the parties, and should lead the court to preserve this practice in cases where circumstances make it desirable.

This libel should, therefore, be dismissed as against the vessel, but without costs, as the objection to the want of any lien should have been taken at the outset of the action, (Wms. & Br. Adm. Pr. 67,) and the sureties upon the bond given upon her release should be discharged; but without prejudice to any application by the libellant, within 10 days, to amend the libel by praying judgment against the owner, who has heretofore appeared and answered herein, and for the usual citation against him; and after due service thereof, or his voluntary appearance, the cause to be heard upon the proofs already taken, and such additional proofs as either party may desire to add.

See *The Alida*, *post*, 343.

THE MILLIGAN.*

THE BRAZIL.*

District Court, E. D. Pennsylvania. February 17, 1882.)

ADMIRALTY—COLLISION—ANCHORING IN CHANNEL—MUTUAL FAULT.

A sloop anchored near the range of range lights, and in a narrow channel, leaving only about 80 feet for passing vessels. A bark, in tow of a tug, while endeavoring to pass, collided with the sloop. *Held*, that the sloop was negligent in anchoring in the channel, but that, as it appeared that the bark could have passed in safety by the exercise of proper care, the damages should be equally divided.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Two libels by the owner of the sloop Nanticoke—one against the bark Milligan and the other against the tug Brazil—to recover damages for injury by collision. The testimony disclosed the following facts:

On March 8, 1881, the sloop was bound up the Delaware river, and when near Chester, the tide being ebb and the wind having died out, she came to anchor in a narrow channel and close to the range of the range lights. While she was in this position the tug Brazil, having in tow by a hawser the bark Milligan, came down the river. The tug passed safely to the eastward, but the bark collided with the sloop, causing the damage for which these libels were filed. The witnesses for libellant testified that the sloop was compelled to anchor at this point on account of the failure of the wind; that she was not in the centre of the channel, but a little to the westward; that the channel was 300 or 400 yards wide; and that the collision was caused by the bad steering of the pilot in charge of the bark in not shaping his course until within a short distance of the sloop. The testimony of respondents' witnesses was to the effect that the channel was not over 150 feet wide for large vessels; that the sloop was directly in the centre of it; that she had been previously warned, from a passing vessel, to change her position; that such change could readily have been made by drifting with the tide 500 feet further down; that from the time the sloop first came in sight the collision was inevitable, owing to the size of the channel and the position of the sloop.

The court propounded certain interrogatories to nautical assessors, which, with the answers thereto, were as follows:

First. Was the anchorage selected by the sloop Nanticoke—very near the centre of the channel at "Schooner Ledge Shoals"—a safe and proper one?

Could she have safely floated back towards the side of the channel below, when the tide changed?

Answer. The anchorage selected by the sloop, as stated in this interrogatory, was neither a safe nor proper one to make, as her position in such a narrow channel would make it difficult for vessels to pass with safety, and extremely so for those of heavy draught, such as our European steamers and vessels of that class.

When the tide commenced to run she could have tripped her anchor and dropped below or into shallow water, where she would have been safe and out of the way of passing vessels.

Second. Supposing the sloop to have been a little to one side of the centre of the channel, westward, leaving 80 feet clear, eastward, should the tug and bark have passed safely?

If you answer they should, please read the testimony of the pilot and master in charge, and say wherein they failed in care and duty. I enclose this testimony.

Answer. A passage of 80 feet, to the eastward of the sloop, allowed ample room for the tug and bark to pass in safety, if the proper care and judgment were used that is necessary in navigating such channels.

The testimony of the pilot and master in charge of the bark shows a want of proper care and judgment in not deciding and shaping her course to the eastward before getting to within 75 or 100 feet of the sloop, although she was seen when a half a mile or more away.

J. Warren Coulston, for the Nanticoke.

C. Gibbons, Jr., for the Milligan.

Henry Flanders, for the Brazil.

BUTLER, D. J. These cases arise out of one transaction,—involve the same facts,—and will be disposed of together. That each party was in fault, I have no doubt—the sloop for lying at anchor where she did, the bark and tug for failing to keep off. While the sloop was not lying upon the range of lights, she was dangerously near it,—subjecting passing vessels to the exercise of unusual care. The position was not forced upon her; she might have anchored lower down, (before reaching it, or by floating back when the tide turned.) She would thus have been out of the way, and out of danger. Her anchorage so near the centre of a narrow channel was inexcusable. The suggestion that she could not safely float back,—that the absence of wind rendered her helpless,—is unsupported by the facts, and entitled to no weight. Her fault in this respect, however, does not excuse the tug and bark, for running into her. They had ample room, with the observance of proper caution, to pass in safety,—probably on either side, certainly to the eastward. The exact width of the channel cannot be ascertained from the testimony; none of the witnesses know it. Those called by the sloop suppose it to be 300 or 400 feet, while those called by the other side suppose it to be about 150 feet. The statements of these witnesses show that they are simply guessing. While the actual width is doubtless much greater, we may safely assume it to be 150 feet. As before stated, the sloop was slightly off the centre, westward, leaving at least 80 feet clear. That this space was amply sufficient, with the exercise of proper care, to admit of safe passage, would seem to be plain; and is so stated by the assessors, (whose answers are attached.) The collision was, therefore, the result of carelessness on both sides. That the sloop was at anchor may possibly not have been discoverable at any great distance. It was known, however, that she was virtually becalmed and motionless, from the time she came in view. That there was not wind sufficient to propel her the witnesses all agree. The answers of the assessors render it unnecessary to say more.

Half damages and half costs will be allowed by the libellant, in each case.

BARK SAN FERNANDO v. JACKSON & MANSON.*

(Circuit Court, E. D. Louisiana. March 18, 1882.)

1. ADMIRALTY JURISDICTION.

Admiralty courts have jurisdiction in all cases of maritime obligations.
Ins. Co. v. Dunham, 11 Wall. 1.

2. GENERAL AVERAGE.

General average comes under the head of maritime obligations, and in such a case, where the consignee has received his goods and given a general average bond, the United States admiralty court has jurisdiction of an action upon such bond, notwithstanding the opinion of the supreme court of the United States in *Cutler v. Rae*, 7 How. 729, under the authority of the late decision of that tribunal.

Admiralty Appeal.

George L. Bright, for libellants.

Thos. Gilmore & Sons, for defendants.

PARDEE, C. J. This suit is brought by a libel *in personam*, to recover the share due by defendants in a case of general average. The record shows a proper case for general average, and that on the arrival of the bark at this port the cargo was delivered on an average bond. The only questions raised in the case are: (1) As to the jurisdiction of the court; and (2) as to the amount due. I have held the case for some time for consideration of the question of jurisdiction. Since the decision in *Ins. Co. v. Dunham*, 11 Wall. 1, there seems to be no doubt that the admiralty courts have jurisdiction in all cases of maritime obligations. And that general average comes under the head of maritime obligations there cannot be much question. In fact, there is no doubt that the claim for general average is a lien enforceable in admiralty on the cargo saved until the delivery of the cargo, and the real question is whether the jurisdiction remains after the lien is lost by delivery, so that the claim may be enforced *in personam* against the consignees.

The obligation of the cargo to contribute, in a proper case of general average, is a maritime obligation for which the cargo is bound, but not the consignees. When the cargo is delivered there is an implied obligation, or, if a bond is taken, an express obligation, on the part of the consignees to contribute the share due by the cargo so received by them. Is this last obligation a maritime obligation?

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

In *Cutler v. Rae*, 7 How. 729, it is clearly decided not to be a maritime contract. It is said:

"The owner of the goods is liable, because at the time he receives the goods they are bound to share in the loss of other property by which they have been saved, and he is not entitled to demand them until the contribution has been paid; and as this lien upon his goods has been discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common-law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods."

It would seem that where the consignee receives the goods and gives a general average bond, the express contract takes the place of, and stands upon the same footing as, the implied obligation referred to in *Cutler v. Rae*. So that, if the case of *Cutler v. Rae* is the law, the question of jurisdiction herein raised is settled adversely. But at the very time of the decision in that case, and ever since, doubts have been thrown upon its correctness. See the remarks of the chief justice rendering the decision, and of Justices Wayne and Catron, dissenting; also Curtis, Jur. U. S. Courts, 261; *Dike v. St. Joseph*, 6 McLean, 573. And in *Ins. Co. v. Dunham*, 11 Wall. 1, it is practically overruled.

It is said by Judge Curtis in *Gloucester Ins. Co. v. Younger*, 2 Curt. 334, that it would be remarkable if the admiralty were held not to have jurisdiction over an implied or express promise to contribute to a general average loss, and yet had jurisdiction over an express promise in a policy of insurance to indemnify one for what he might be obliged to contribute. Since the case of *Dunham*, referred to, this last jurisdiction is undisputed. The practice in the courts of this district has been in favor of the jurisdiction claimed, and the learned district judge in this case has maintained it. Although the case of *Cutler v. Rae* has never been directly overruled, I think I must either disregard that case or else disregard the later decisions of the supreme court. The learned proctors for defendants are a little confused in the cases cited as to contracts for towage, master's wages, and mortgages. In those cases (*libels in rem*) it was held that where there was no lien there was no jurisdiction to proceed *in rem*.

As to the amount claimed, while there is some doubt about the charges for commissions and for the adjuster's services, yet, as these charges are proved to be regular, and the report of the adjuster containing them is approved by the average committee of the board

of underwriters, I am not disposed to have the matter re-examined. The adjustment made at the port of destination I understand to be the correct one, and clearly the one made at Passages, Spain, was erroneous, and the libellants were not bound by it, particularly when the respondents rejected it.

Let a decree in terms affirming the judgment of the district court be entered.

THE ALIDA.*

(Circuit Court, E. D. Pennsylvania. April 24, 1882.)

1. PRACTICE—JOINDER OF ACTIONS IN REM AND IN PERSONAM.

Proceedings *in rem* and *in personam* cannot be joined in the same libel, except in the cases specified in the admiralty rules promulgated by the supreme court.

2. CONTRACT—MUTUAL PERFORMANCE.

One party to a contract cannot recover damages for its breach if he has failed to perform his part of it.

Appeal from the decree of the district court.

See opinion reported in 8 FED. REP. 47.

Theodore M. Etting and Henry R. Edmunds, for libellant.

Henry Flanders, for respondents.

McKENNAN, C. J. On the twenty-sixth of May, 1880, at Philadelphia, T. Conrow, for the owners of the steam-tug Alida,—he being the equitable and thus the real owner of the entire vessel,—proposed to charter to G. H. Ferris the tug for two months, at the price of \$500 per month, for the purpose of "towing in North Landing river and Currituck sound," North Carolina; the tug to be furnished with coal. This proposal was accepted by Ferris. It was also agreed that Ferris should furnish the master with provisions for his crew, and should pay the current expenses of the tug, the amount so expended to be deducted from the hire of the vessel, and the residue, if any, to be paid at the end of each month. The tug left Philadelphia on the twenty-seventh of May, arriving at Norfolk June 1st, and proceeded to North Landing river, some 30 miles distant from Norfolk, where she remained in the service of the libellant until the fourteenth of June, when she returned to Norfolk for want of supplies. The libellant did not furnish needed supplies for the vessel, nor pay her current expenses. Nor was the master able to obtain supplies upon

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the credit of the libellant without implicating the vessel, and he, therefore, left the libellant's service and returned with his vessel to Philadelphia. The libellant has brought this suit to recover damages for an alleged breach of contract by the respondents, and in his libel prays for a decree against both the tug and the respondent Conrow.

It is obvious that a fulfilment by the libellant of the terms of the contract to be performed by him, is an essential condition of his right to recover. If he failed to do what he stipulated to do, the other party was thereby absolved from any duty of performance on his part. Now, he stipulated to furnish supplies to the crew of the tug. Upon the faith of his stipulation the owner of the tug entered into the contract, and its observance was, besides, necessary to enable the tug to render the service for which its owner contracted. But he neglected or failed to fulfil his engagement in this regard, and the efforts of the master of the tug to make his personal credit available to obtain supplies were unsuccessful. His default, therefore, justified the owner of the tug in withdrawing it from his service, and in refusing to proceed further in the execution of the contract.

This is enough to dispose of the libel; but another question is presented upon the record and has been fully discussed, which it is not, therefore, out of place to notice. In the court below the libel was excepted to and its dismissal urged because it unites a proceeding *in rem* with a proceeding *in personam*; and it is insisted on here. That these remedies are incompatible, and cannot, therefore, be joined in the same libel, is the unquestioned law of England. Cootes, Adm. Pr. 8. So far as the question has been judicially considered in this country there is no substantial diversity of decision. In *Citizens' Bank v. Nantucket Str. Co.* 2 Story, 57, and *Dean v. Bates*, 2 Wood. & M. 87, it was stated with special emphasis to be the law, that proceedings *in rem* and *in personam* were so different in their character and result that they could not be joined in the same libel. These cases were both decided before the promulgation by the supreme court of rules in admiralty in 1847, and as only exceptional provision is thereby made for a joint libel, the general rule, as stated in the cases referred to, must be considered as receiving the sanction of the supreme court.

On neither of the grounds stated can the libel here be maintained, and it must, therefore, be dismissed, with costs.

THE ACCAME.*

(District Court, E. D. Pennsylvania. March 17, 1882.)

CHARTER-PARTY—VERBAL OFFER—RENEWAL OF PREVIOUS OFFER—CHANGE IN
TERMS—CONFLICT OF TESTIMONY—BURDEN ON PARTY ALLEGING CHANGE
IN THE OFFER.

Libel *in personam* by the owners of the bark Accame against Gill & Fisher, Limited, to recover damages for breach of charter-party. The testimony disclosed the following facts:

On April 1, 1880, Pietro Accame, the agent of the vessel, gave to the respondents an option, known as a cable refusal, to charter the bark for a voyage to the continent of Europe, with full range of ports. This option expired April 3d, without having been taken advantage of by respondents. Afterwards Carl Gardeicke, the Philadelphia agent of the bark, made a verbal offer to Mr. Barker, one of respondents' firm, to charter the bark for a voyage to the continent of Europe, which offer was accepted. Mr. Gardeicke testified that his offer contained a condition excluding the port of Rouen. Mr. Barker, however, testified that nothing was said about the exclusion of Rouen, and that he understood the terms of the offer to be the same as those of the cable refusal. On the day of the acceptance of the offer Gardeicke prepared and sent to respondents a charter, which respondents the same day refused to sign because it contained a clause excluding Rouen. Subsequent negotiations failing to remove this misunderstanding as to the terms of the contract, and freights having declined, the owners of the bark chartered her at reduced rates, and filed this libel against respondents for damages.

Edward F. Pugh and Henry Flanders, for libellant.

Richard C. McMurtrie, for respondents.

BUTLER, D. J. The alleged contract is not satisfactorily proved. The contracting parties were Mr. Gardeicke, the libellant's broker, and Mr. Barker, of the respondents' firm. That Mr. Gardeicke intended to inform Mr. Barker that Rouen was to be excluded from the voyage, and believes he did so, is clearly shown by his subsequent conduct, as well as by his testimony taken in the case. But it is quite as clearly shown by the testimony of Mr. Barker, and his conduct at the time of the transaction, and immediately after, that he was not so informed. Mr. Gardeicke may have mentioned the subject, but Mr. Barker cannot have understood him. His telegrams of the same day, and his refusal to sign the written charter-party containing the exclusion, a few hours after the conversation, render this quite clear. The previous offer of the vessel without the exclu-

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

sion of Rouen, made it necessary to bring the proposed change in this regard very distinctly to Mr. Barker's mind. Although the offer had not been accepted, Mr. Barker was justified in regarding Mr. Gardeicke's subsequent proposition as a renewal of it, in the absence of specific information to the contrary; and this information I am satisfied Mr. Barker did not receive, however much Mr. Gardeicke may have intended and sought to convey it.

This view of the facts renders an examination of other questions discussed unnecessary. There was no contract; and the fact that the writing signed by libellant remained for some time in respondents' possession, under the circumstances shown, is unimportant. The libellant was fully informed, from the outset, that it would not be signed, and knew that it was at his disposal.

A decree must be entered dismissing the libel, with costs to respondents.

THE CLYMENE.*

(Circuit Court, E. D. Pennsylvania. April 29, 1882.)

1. PILOTAGE—ACT OF CONGRESS—COTERMINOUS STATES.

The act of congress of March 2, 1837, authorizing the master of a vessel bound to or from a port situate on waters which are the boundary between two states, to employ a pilot licensed by the laws of either state, applies to the pilotage laws of coterminous states situated upon a navigable river which is not a separating boundary between them.

2. SAME—CONFLICT OF LAWS.

A pilot licensed by the state of Delaware may recover for services in piloting a vessel up the Delaware bay and river to Philadelphia, notwithstanding a statute of Pennsylvania prohibiting any one from acting as such pilot without a Pennsylvania license.

Appeal from a decree of the district court sustaining a libel filed by a Delaware pilot against a steam-ship for piloting the latter to Philadelphia, the defence being that the libellant held only a Delaware license, and that there was a Pennsylvania statute prohibiting any one from acting as such pilot without a Pennsylvania license. The facts and the opinion of the district court are fully reported in 9 FED. REP. 164.

Henry G. Ward, Morton P. Henry, and Richard C. McMurtrie, for appellants.

Curtis Tilton, Henry Flanders, and Hon. Thomas F. Bayard, for appellee.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

McKENNAN, C. J. The question upon which the decision of this case turns is said to be one of great commercial importance, but I do not think it is difficult of solution. It involves the applicability of the act of congress of March 2, 1837, to the pilotage laws of coterminous states situated upon the same navigable waters, but which are not the separating boundary between them. If such states are within its purview, it is admitted that the libel must be sustained.

That the act of congress is operative upon the laws of states so situated I have no doubt. Such a construction is clearly within the reason of the act, and such was held to be its effect by the supreme court of Pennsylvania in *Flanigen v. Ins. Co.* 7 Pa. St. 306, in reference to the law of that state, which is in question here.

But I do not propose to do more than state the conclusion which I have reached. The opinion of the learned judge of the district court, in deciding this case, is so satisfactory that I adopt it as showing the reasons for the judgment of this court.

There must, then, be a decree in favor of the libellant for the amount of his claim, viz., \$97.50, and costs.

UNITED STATES v. TOBEY.*

(District Court, E. D. Pennsylvania. February 27, 1892.)

DEATH OF SEAMAN — SALE OF HIS EFFECTS — RIGHT OF MASTER TO DEDUCT AMOUNT DUE SHIP.

Where the master of a vessel sells at the mast the effects of a deceased seaman, and accounts to a shipping commissioner for the proceeds, in accordance with section 4538, Rev. St., he cannot deduct from such proceeds the amount due the ship by the sailor for wages advanced but not earned.

Motion for judgment *non obstante veredicto*. This was a suit by the United States against the master of a vessel to recover the proceeds of a seaman's effects. On the trial it appeared that Peter Rouel, a seaman on the ship *Santa Clara*, died during a voyage from San Francisco to Queenstown. He had at the time of his shipment at San Francisco received \$75 advance wages. After his death his effects were sold by the master according to law, at the mast, under section 4538, Rev. St. At this sale his effects, including a \$20 gold

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

piece in decedent's possession, amounted to \$49.60. Upon the arrival of the ship at Philadelphia the master reported the sale to a shipping commissioner and stated the seaman's accounts as follows:

Amount of advance,	-	-	-	-	-	-	\$75 00
Duration of service, 1 month and 21 days, at \$25 per month,	-	-	-	-	-	-	42 50
							<hr/> \$32 50
Amount received from effects,	-	-	-	-	-	-	\$49 60
Amount due ship,	-	-	-	-	-	-	32 50
							<hr/>
Paid to shipping commissioner,	-	-	-	-	-	-	\$17 10

The shipping commissioner denied the right of the master to make any deduction from the proceeds of the seaman's effects, and to test the right to make such deduction this suit was brought.

The court directed a verdict for plaintiff for the whole proceeds, reserving the point whether the master should have paid the whole sum of \$49.60 to the shipping commissioner for payment into court, or was entitled to deduct the amount due by the seaman.

Defendant moved for judgment *non obstante veredicto*.

John K. Valentine, U. S. Dist. Atty., for plaintiff.

Henry R. Edmunds, for defendant.

BUTLER, D. J., (*orally*.) Judgment must be entered for the plaintiff on the verdict. The language "the total amount of deduction, if any, to be made therefrom," found in specification 3 of section 4538, applies only to *wages due the deceased* mentioned in this specification. The proceeds of the effects of the deceased must be paid to the shipping commissioner or accounted for, as provided by the section. No deductions from such proceeds can be made on account of any claim due the vessel by the deceased.

The question stated in the opinion of the district judge was argued also before Circuit Court Judge McKENNAN, as if on a writ of error from the circuit court, who said:

I am entirely satisfied that the judgment directed by the district judge is right, and therefore concur with him in the construction given to the act of congress.

Mortgage—Fraudulent Preference.

In re B. F. ALLEN. This case was decided by the supreme court of the United States at the October term, 1881. Mr. Justice *Woods* delivered the opinion of the court, affirming the decree of the circuit court.

Except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and the vigilant creditor is entitled to the advantages secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors, who have acquired no specific lien on the property described in the mortgage. But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage, which covers the mortgagor's entire estate, and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give credit to the mortgagor, who fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor. It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay, or defraud creditors, it is void as against them, although there may be in the strictest sense a valuable, or even an adequate, consideration.

A. P. Hyde and Coles, Morris & Nourse, for appellants.

Bisbee & Ahrens and J. S. Polk, for appellee.

The cases cited in the opinion were: That a preference may be void although there be a valuable or even adequate consideration. *Twyne's Case*, 3 Coke, 81; *Holmes v. Penney*, 3 Kay & J. 99; *Gragg v. Martin*, 12 Allen, 498; *Brady v. Briscoe*, J. J. Marsh. 212; *Bosman v. Draughm*, 3 Stew. 343; *Farmers' Bank v. Douglass*, 11 Smedes & M. 469; *Root v. Reynolds*, 32 Vt. 139; *Kempner v. Churchill*, 8 Wall. 362. A deed may become fraudulent by concealment; *Hungerford v. Earle*, 2 Vern. 260; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Scrivener v. Scrivener*, 7 B. Mon. 374; *Bank of U. S. v. Hineman*, 6 Paige, 526; as by withholding deed from record; *Coates v. Geriach*, 44 Pa. St. 43; *Hilliard v. Cagle*, 46 Miss. 309; *Gill v. Griffith*, 2 Md. Ch. 270; *Hafner v. Irwin*, 1 Ired. 490; *Hildeburn v. Brown*, 17 B. Mon. 779; *Neslin v. Wells*, 25 Alb. Law J. 249; *Worseley v. De Mattos*, 1 Burr. 467; *Tarback v. Marbury*, 2 Vern. 510.

Administration of Trust Funds.

INTERNATIONAL IMPROVEMENT FUND OF FLORIDA v. GREENOUGH. Appeal from the circuit court of the United States for the northern district of Florida. The question in this case is one of costs, expenses, and allowances awarded to the complainant below out of a trust fund under control of the court. The case was decided in the United States supreme court in April, 1882. Mr. Justice *Bradley* delivered the opinion of the court affirming the decree of the circuit court. Mr. Justice *Miller* dissenting.

An appeal lies from an order directing costs to be paid out of funds in the hands or under the control of the court. The proceedings before the master may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal. It is a general principle that a trust estate must bear the expenses of its administration, and where one of many parties having a common interest in the trust fund at his own expense takes out proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by proportional contribution from those who accept the benefits of his efforts. In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the states, to make fair and just allowances for expenses and counsel fees to the trustees or other parties promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject; but an allowance for private and personal expenses is illegal.

Cases cited in the opinion: *Angell v. Davis*, 4 Mylne & C. 360; *Taylor v. Dowlan*, L. R. 4 Ch. App. 697; *Atty. Gen. v. Brewers' Co.* 1 Peere Wms. 376; *Atty. Gen. v. Kerr*, 4 Beav. 297; *Atty. Gen. v. Old South Society*, 13 Allen, 474; *In re Paschal*, 10 Wall. 483; *Stanton v. Hatfield*, 1 Keen, 388; *Thompson v. Cooper*, 2 Collyer, 87; *Tootal v. Spicer*, 4 Sim. 510; *Larkin v. Paxton*, 2 Mylne & K. 320; *Barber v. Wardle*, Id. 818; *Sutton v. Doggett*, 3 Beav. 9; *Worrall v. Harford*, 8 Ves. Jr. 4; *In re Williams*, 2 Bank Reg. 28; *In re O'Hara*, 8 Law Reg. (N. S.) 113; *Ex parte Plitt*, 2 Wall. Jr. 453; *Cowdrey v. Galveston R. Co.* 93 U. S. 352; *Robinson v. Pett*, 2 White & T. Lead. Cas. in Eq. 238.

Estate upon Condition.

GILES v. LITTLE. In error to the circuit court of the United States for the district of Nebraska. This was an action brought for the recovery of a lot of land in the city of Lincoln. The contention of the plaintiff in error is that the wife of deceased took an estate for life, subject to be determined in case she contracted another marriage, with remainder to heirs of deceased, and that the power of disposal conferred on her by will was co-extensive with the estate she took; that is, that power was granted to her to dispose of her life estate, and consequently the estate conferred by her determined upon her marriage. The case was determined in the United States supreme court, at the October term, 1881; Mr. Justice Woods delivering the opinion of the court reversing the judgment of the circuit court, and remanding the cause with directions to proceed in conformity with the opinion.

Where a testator devises and bequeaths all the property of which he should die seized to his wife, with full power to dispose of the same so long as she shall remain a widow, upon the express condition "that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike:" *held*,

that the widow took a life estate, subject to be divested upon her ceasing to be a widow, with power to convey the life estate only.

Cases cited in the opinion: *Bradly v. Wescott*, 13 Ves. Jr. 445; *Smith v. Bell*, 6 Pet. 68; *Boyd v. Strahan*, 36 Ill. 355; *Clarke v. Boorman*, 18 Wall. 498; *Green v. Hewitt*, 12 Cent. Law J. 58; *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326.

Bankruptcy—Fraudulent Preference.

HANSELT v. HARRISON. Error to the circuit court of the United States for the western district of Pennsylvania. An action of replevin was brought in the circuit court by defendant in error to recover possession of certain tanned skins and bark transferred by the bankrupt to the plaintiff in error in fraud of the bankrupt law. The case was decided in the supreme court on April 10, 1882. Mr. Justice *Matthews* delivered the opinion of the court reversing the judgment of the circuit court.

An agreement was entered into by the terms of which the party of the first part was to tan, curry, and finish certain skins, and when finished to send them to the party of the second part, pledging the skins before shipping to the party of the second, the latter to make certain advances for the purpose of enabling the former to carry out his agreement. The party of the first part becoming embarrassed and unable to further carry out his agreement, a second agreement was entered into, whereby the party of the second part was authorized to take immediate possession of tannery buildings and materials in hand. *Held*, that the latter transaction, though made with knowledge of the party's insolvency and in contemplation of bankruptcy, if made in good faith was legitimate, and did not constitute an unlawful preference.

Lewis Sanders, for plaintiff in error.

M. F. Elliott and H. C. Parsons, for defendant in error.

Cases cited in the opinion: *Powder Co. v. Burkhardt*, 97 U. S. 110; *Gregory v. Morris*, 96 U. S. 619; *Cook v. Tullis*, 18 Wall. 351; *Yeatman v. Savings Inst.* 95 U. S. 764; *Winson v. McLennan*, 2 Story, 492; *Stewart v. Platt*, 101 U. S. 739.

Patents for Inventions.

BRIDGE, BEACH & Co. v. EXCELSIOR MANUF'G Co. 21 O. G. 1955. Appeal from the circuit court of the United States for the eastern district of Missouri. This case arises upon a bill in equity founded on letters patent granted for an improvement in cooking-stoves. The case was decided on appeal in the supreme court of the United States on May 8, 1882. Mr. Justice *Bradley* delivered the opinion of the court affirming the decree of the circuit court.

Letters patent claiming, "in combination with a stove door, a hinged shelf, fitted to fall outward and down automatically when the oven door is opened and to be raised up by closing the oven door, adapted to operate on it for that purpose," covers only the specific devices for raising and lowering the hinged shelf, and as both devices claimed operate upon the same principle precisely

as that which has been used for a long time for other similar purposes, and as defendants use a different device, they are not guilty of infringement.

R. H. Parkinson, for appellants.

S. S. Boyd, for appellees.

Admiralty—Appeal—Practice.

WINSLOW v. WILCOX; *WILCOX v. WINSLOW*. Appeal and cross-appeal from the circuit court of the United States for the northern district of Ohio. The question presented by the appeal in this case is whether the circuit court erred in taking jurisdiction of the appeal from the district court. The decision of the supreme court of the United States was rendered on April 3, 1882. Mr. Chief Justice *Waite* delivered the opinion, affirming the decree and dismissing the cross-appeal.

The rule of the district court requiring an appeal to be in writing and filed with the clerk could be dispensed with by that court; and if the district court allows an appeal without the writing, the appellee cannot object to the jurisdiction of the circuit court on that account. When, afterwards, the bond is given and accepted the appeal is perfected, and from that time the jurisdiction of the circuit court attaches; and a provision in the rule of the district court that the clerk shall prepare and deliver to the circuit court the appeal and record in 20 days, cannot prevent the circuit court from entertaining the cause, if, for any reason, this is not done. Cross-appeals must be prosecuted like any other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor on his own behalf, by appearance of counsel and giving the security required by the rules, otherwise he will not be heard on such appeal; citing *Grigsby v. Purcell*, 99 U. S. 505.

H. A. Terrell and A. G. Riddle, for appellants.

L. Prentiss and Jacob D. Cox, for cross-appellants.

Admiralty—Practice.

NICKERSON v. MERCHANTS' STEAM-SHIP COMPANY. Appeal from the circuit court of the United States for the district of Maryland. This case was decided in the supreme court of the United States on March 27, 1882. Mr. Chief Justice *Waite* delivered the opinion, affirming the motion to dismiss the case.

Where the only question presented arises on the findings of fact, and from these it appears that the collision was due solely to an unjustifiable change of course of the schooner when the vessels were in close proximity, which baffled the steamer in her efforts to pass in safety, the steamer is not liable for the consequences.

John H. Thomas and George L. Thomas, for appellee.

DAVIES and another, Adm'rs, etc., v. LATHROP, Receiver, etc.

(Circuit Court, S. D. New York. March 9, 1882.)

1. REMOVAL OF CAUSE—ACTION FOR CAUSING DEATH—JURISDICTION.

A suit for damages for death caused by negligence, brought against a receiver of a corporation in a state court of New York, was, on motion, removed into the circuit court for that district, on the ground that such receiver was a citizen of New Jersey. The suit had been brought under a statute of the state of New York permitting such suits to be brought for \$5,000 damages. At the trial plaintiff amended his complaint by inserting a claim for damages under the statute of New Jersey, which gave permission to bring such suit, with no limit to the amount of damages specified. *Held*, on motion to remand the cause to the New York state court, that this court had jurisdiction notwithstanding defendant had been appointed ancillary receiver in the state of New York.

2. RECEIVER—CITIZENSHIP.

A receiver is a representative as much as an executor, and his personal citizenship will be regarded on a motion to remand the cause to the state court.

B. Loewy, for plaintiffs.

R. W. De Forest, for defendant.

BLATCHFORD, C. J. This suit was begun in the supreme court of New York in August, 1879. It is brought to recover \$5,000 damages for the death of the intestate of the plaintiffs caused at South Amboy, in New Jersey, by a train on the railroad of the Central Railroad Company of New Jersey, in June, 1879, while the road was being operated by the defendant, as receiver of the company, through his employes who were running the train. The complaint is manifestly framed on a liability of the defendant in a court of New York, under a statute of New York. The complaint alleges that the defendant "is receiver" of the railroad, "a corporation which was doing business in fact under the laws of this state, having its principal office, now the office of said receiver, in said city of New York;" that "he became receiver duly by appointment of court;" that "as such receiver" he was, in June, 1879, managing and operating the road; and that "while so operating said road" he, through his employes engaged in running a train on said road, killed the intestate by negligence at South Amboy. The complaint then states that the suit is brought for \$5,000 damages done by such killing to the next of kin of said intestate, a son and her husband, and that the "plaintiffs, as her personal representatives, for the benefit of and as compensation for injury done to her next of kin, and under the statute of said state of New York, pray judgment for the full amount, to-wit, said amount of

\$5,000 statutory damages, against said defendant, as well as for costs of this action, permission to bring which was given to plaintiffs by order of this court August 20, 1879; or, likewise for the benefit of those indicated by said statute, plaintiffs, as such representatives, pray judgment against said defendant for such relief as to the court shall seem just." This complaint does not allude to a statute of New Jersey. Though it does not say that the defendant was appointed receiver by a court of New York, it alleges permission given by the supreme court of New York to bring the suit. The suit, as made by the complainant, must be regarded as one brought on a statute of New York against the defendant as a New York receiver.

In August, 1879, the defendant put in, in the state court, an answer to the complaint, alleging that he was duly appointed receiver of the company, by the court of chancery of New Jersey, in February, 1877; that two days thereafter he was duly appointed by the supreme court of New York receiver of the property of the company situate within the state of New York; that such last appointment was in connection with and ancillary to his appointment as receiver by the court of chancery of New Jersey; and that, pursuant to his appointment as receiver by the chancellor of New Jersey, he operated said railroad during June, 1879. He admitted the killing of the intestate at South Amboy, New Jersey, and the existence of said next of kin, and the permission of the New York court to bring "this action," and denied the alleged negligence.

In October, 1879, the defendant, as a citizen of New Jersey, the plaintiffs being citizens of New York, removed the suit into this court, the state court making an order of removal. In January, 1882, the suit came on for trial in this court before a jury. The court, at the trial, allowed the plaintiffs to amend their complaint by inserting at the end thereof, immediately before the prayer for relief, an allegation that the statute of New Jersey in force at the time of the death of the intestate provided as follows, (setting it forth;) it being a statute giving, in case of the death of a person by neglect, where he would have had an action for damages for injury if he had lived, an action for damages to his personal representatives for the benefit of his next of kin, no limit to the amount of damages being specified. At the same time the defendant was allowed to amend his answer by inserting the order of the New York court granting leave, and alleging that no other leave to sue was ever granted to the plaintiffs. The leave was "to bring an action in this court against said Francis S. Lathrop, receiver of the Central Railroad of New Jersey, acting as

such within the jurisdiction of the court, for the alleged wrongful killing of said decedent through negligence and carelessness." The defendant was also allowed to amend his answer so as to admit permission to bring "an action," instead of "this action." At the trial, the order of leave made by the New York court, and the order of the New York court appointing the defendant receiver of the property of the company "situate within the state of New York," in connection with and ancillary to his receivership under his New Jersey appointment, and the fact that the company was a New Jersey corporation, and papers showing the receivership under the New Jersey appointment, were put in evidence, (the court having excluded the plaintiffs' offer to prove the facts stated in the complaint,) and the defendant moved the court to dismiss the complaint, on the grounds that, as to the defendant as a New Jersey receiver, the court had no jurisdiction of the suit; and that, as to the defendant as a New York receiver, the complaint contained no cause of action. The court decided that the complaint must be dismissed on those grounds, but no order or judgment to that effect has been entered. The plaintiffs now move to remand the cause to the state court on the ground that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court." The question as to the propriety of the removal, or as to remanding the cause, was not presented at the trial.

The plaintiffs contend that as the defendant was sued as a receiver appointed by the New York court, by its leave, and in it, he must, though personally a citizen of New Jersey, be regarded, for the purposes of the removal, as a citizen of New York; that the leave granted by the New York court was to sue in that court its own officer; and that the suit was not brought against the New Jersey officer.

The defendant contends that the citizenship of the parties personally was different, and sufficient to warrant the removal; that the suit being brought against the defendant as a New York receiver, there was jurisdiction as to the subject-matter alleged in the complaint, and as to the person of the defendant, and there was diversity of citizenship, and the only defect as to the New York receiver was that there was no cause of action, on the facts alleged in the complaint, even if they were proved; that the duty of the court, under section 5 of the act of March 3, 1875, (18 St. at Large, 472,) where it has no jurisdiction of the controversy, is "to dismiss the suit or remand it," and it has already decided to dismiss it; and that

the motion is too late, because it is made after the plaintiffs submitted to and invoked the jurisdiction of this court at the trial.

This case must first be considered in reference to its condition when it was brought and when it was removed into this court. There was then in force a statute of New York (act of December 13, 1847, c. 450; act of April 7, 1849, c. 256; act of March 16, 1870, c. 78) providing for suits by the personal representatives of a deceased person to recover damages for his death by wrongful neglect, not exceeding \$5,000. The New Jersey act, set up by said amendment, was passed March 3, 1848, immediately after the first New York act, and in substantially the same words, not being limited to \$5,000; the amount being limited to \$5,000 by the New York act of 1849. The New York act does not in terms require that the wrongful neglect or the death should have occurred within the territorial limits of New York. The original complaint is based on the view that, although the occurrence took place in New Jersey, on a railroad there, damages for the death could be recovered in a New York court, by virtue of the New York statute, from the receiver alleged to have caused the death, he being an appointee of the New York court, and that court having granted permission to bring the suit. The case, as made by the original complaint, had no reference to the New Jersey statute, or to an appointment of the defendant as receiver by the New Jersey court, and, of course, there was no occasion for the plaintiffs then to allege or show any leave by the New Jersey court to bring the suit. Accordingly, in his answer, the defendant set up that he was appointed receiver of the company by the New Jersey court; that he was afterwards appointed by the New York court receiver of the property of the company in New York; that the latter appointment was ancillary to the former; that he was operating the road by virtue of his New Jersey appointment; that the intestate was killed at South Amboy, in New Jersey; and that permission to bring this suit was given by the New York court. The answer demanded judgment for the dismissal of the complaint.

The cause of action thus shown by the original complaint, at the time of the removal, involved a subject-matter of which this court could take jurisdiction. There could be no objection to suing the receiver as a New York receiver; because the court which appointed him had given leave to sue him. No restriction arising out of the words, in the order of permission, "acting as such within the jurisdiction of the court," as applied to the fact set out in the original

complaint, seems to have been supposed to exist. None such is set up in the original answer, and there was a general appearance by the receiver, and a general answer, and no allegation of want of jurisdiction, and an admission that the order gave permission to bring "this action." Then the removal petition was presented, based on diversity of citizenship. The record was filed in this court November 6, 1879, by the defendant. The plaintiffs never made any motion to remand, but went to trial.

Was the cause a removable one, and within the jurisdiction of this court, as it stood down to the time the pleadings were amended? The order of the New York court, appointing the defendant receiver, appoints him receiver of the property of the company in the state of New York, or which shall come within that state, and of such property only. It gives him the usual powers of receivers, restraining him from selling any of said property without the order of the court, but allowing him to use the same to operate the railroad and the ferry-boats of the company. It then enjoins all persons from taking any proceeding against the company, "or its property within the state of New York, or from obtaining any preference over other creditors as against the same." It then orders that the defendant be deemed receiver of said property "in connection with and ancillary to his receivership under and by virtue of any appointment of himself as receiver by the court of chancery of the state of New Jersey." The order of leave made by the New York court gives permission to the plaintiffs "to bring an action in this court" for the alleged wrongful killing; that is, in the supreme court of New York. But afterwards, on the petition for removal, that court made the order removing the suit into this court for trial, and declaring that it would proceed no further therein. That is equivalent to leave to bring and prosecute the suit in this court, so far as any objection or restriction by the New York court is concerned. It left open only the question whether this court could, by reason of the citizenship of the parties, acquire and retain jurisdiction of the suit. The fact that the defendant was appointed a receiver by the New York court does not deprive this court of its jurisdiction derived from the fact of his being a citizen of New Jersey, while the plaintiffs are citizens of New York, and from the removal proceedings, when the state court has thus expressly sanctioned the removal to this court. Therefore, the removal was regular and proper when it was made.

Adding to the complaint the allegation as to the New Jersey statute and its provisions did not destroy or alter the cause of action already

attempted to be set forth in it against the New York receiver, under the New York statute. This is shown by the fact that in the order amending the complaint is found the provision amending the answer by inserting the order of the New York court granting leave, and alleging that no other leave to sue was granted. At most, under the pleadings, the original cause of action was left untouched, and another one was added. At the trial, the suit seems, under the amended pleadings, to have been regarded as a suit under both statutes against both receivers. This court, having jurisdiction of it as respected the New York receiver and the cause of action alleged against him under the New York statute, and having jurisdiction by the citizenship of the parties, and by reason of the subject-matter, and by the permission and order of the New York court, proceeded, as it had a right to do, to adjudicate as to the merits of such cause of action, and decided against the plaintiffs thereon. It then also decided against any cause of action as respected the New Jersey receiver, for want of jurisdiction, which must have meant that the want of jurisdiction was that there was no leave to sue given by the New Jersey court, the cause of action having arisen in New Jersey. Absence of such leave took away the jurisdiction of this court as respected the New Jersey receiver. This is fully decided in *Barton v. Barbour*, 14 Chi. Leg. N. 185, a recent case in the supreme court of the United States. But that is not sufficient cause for remanding the suit. It might have been sufficient cause for striking out any cause of action against the New Jersey receiver, and it was sufficient cause for dismissing the complaint as to the New Jersey receiver. The original alleged cause of action against the New York receiver remained, however, and, if the amendments to the complaint were to be considered as only adding an allegation of a cause of action against the New York receiver, founded on the New Jersey statute, the decision that the complaint, as amended, did not state a cause of action against the New York receiver, was a decision on the merits, as respected a cause of action under either statute, in a suit of which, as before shown, the court had jurisdiction.

The defendant, while an officer of the New York court and sued as such, was a citizen of New Jersey. He was a representative as much as an executor or a trustee is. In fact, he was a trustee. The personal citizenship of the executor or trustee is what is regarded. *Rice v. Houston*, 13 Wall. 66; *Knapp v. Railroad Co.* 20 Wall. 117, 123. The New York court, by the order of removal based on the New Jersey citizenship, authorized this court, as against the New

York court, to treat the defendant as a citizen of New Jersey, sued for a recovery of \$5,000 and costs. It confided to him the responsibility of defending the suit, and this court has a right to deal with his personal citizenship on the question of removal.

It follows that the motion to remand must be denied.

HALE v. CONTINENTAL LIFE INS. CO.

(Circuit Court, D. Vermont. June 14, 1882.)

1. JURISDICTION—APPEARANCE—WAIVER OF IRREGULARITIES.

Where defendant appeared and demurred to the bill, the parties are before the court, and jurisdiction has attached, it is too late for defendant to object to the jurisdiction for want of sufficient service of summons.

2. SAME—EXTENT OF—EQUITY.

The jurisdiction of the circuit court in equity is to be measured by that of the state court of chancery.

3. CONTRACT—MISREPRESENTATIONS—ENDOWMENT POLICY.

A contract is not vitiated by misrepresentations which were wholly as to what would be done thereafter, and not as to any past or then present fact. This doctrine applied to a case where complainant was induced to take an endowment policy upon his life in the defendant company through various representations made by defendant's agent, to the effect that the profits would amount to enough to pay and cancel notes given by him in payment for the policy, and otherwise as to what the insurance would amount to.

4. SAME—EQUITABLE RELIEF.

Where there is no way to protect and preserve the rights of both parties in a suit in equity but to carry out the contract according to its legal effect, as affected by such representations, estoppels, and additional contracts as may be shown, a bill which prays that the transaction be declared void, that the notes delivered be given up, and the amount of premiums paid be decreed to be refunded, with interest, while the complainant had some insurance on his life during the running of the policy, essentially lacks equity; but he is entitled to a share in the profits belonging to him, to be applied on the notes, and on that ground the bill should be retained.

In Equity.

Gilbert A. Dain, for the orator.

Charles W. Porter, for defendant.

WHEELER, D. J. The bill alleges in substance that the orator was induced to take an endowment policy upon his life in the defendant company, with a right to share in profits, and to pay premiums thereon, partly in money and partly by his notes, through various representations made by the defendant's agent to the effect that the

profits would amount to enough to pay and cancel the notes, and otherwise as to what the insurance would amount to; that the time has elapsed, and the defendant insists upon taking the amount of the notes from the amount of the policy, and refuses to pay what the agent represented the insurance would amount to upon the payments made, and prays that the transaction may be declared to be void, the notes decreed to be given up, the amount of premiums paid decreed to be refunded, with interest, and for general relief.

The plaintiff is a citizen of New Hampshire, the defendant of Connecticut, and the suit was brought in the state court of chancery and has been removed to this court. The service of process was made upon a statutory agent required by the laws of the state for that purpose. The defendant demurs to the bill for want of sufficient jurisdiction acquired by the service, and for want of equity, and the cause has been heard upon the demurrer. The jurisdiction is to be measured by that of the state court of chancery. That court is a court of general equity jurisdiction, and has full cognizance of all such cases as this, if any court of equity would have, between parties properly before it. As the defendant appeared and demurred, the parties are before the court and the jurisdiction has attached, and there can be no question remaining upon the demurrer except as to the equity of the bill, and that question is to be attended to.

The misrepresentations relied upon to avoid the contract were wholly as to what would be done thereafter, and not as to any past or then present fact. The orator had some insurance upon his life during the running of the policy. His claim now is that it does not amount to so much as the defendant represented it would, and as he expected. The fraud, if there is any, did not exist at the time of the making of the contract, and could not vitiate it. Such fraud would not work backwards. The insurance which the orator has had cannot be restored. There is no way to protect and preserve the rights of both parties but to carry out the contract according to its legal effect, as affected by such representations, estoppels, or additional contracts as may be shown. The bill essentially lacks equity in this aspect. The question remains whether there is any other ground stated for equitable relief, for if there is the bill ought to be retained to prevent multiplicity of litigation.

As the bill stands the orator is entitled to a share in the profits, to be applied on his notes. The share belonging to him is apparently a proper subject of accounting. The taking that account and applying the amount to which the orator is entitled to the satisfaction of

the notes, would be a proper subject for equitable cognizance. On that ground it appears that the bill should be retained.

The demurrer is overruled, the defendant to answer over by the next rule-day but one.

ROBINSON v. NATIONAL STOCK-YARD CO.

(Circuit Court, S. D. New York. June 7, 1882.)

1. JURISDICTION—FOREIGN CORPORATION—SERVICE OF PROCESS ON.

A foreign corporation may exercise its franchises and transact business within the state upon such conditions as the laws of the state may impose, and may consent to be "found" within the state, within the meaning of the Revised Statutes, § 739.

2. SAME.

The question whether a party has been properly served with process or not, or whether he has waived his personal privilege, is not a question of pleading, but one of practice, and it cannot be raised by demurrer.

Emott, Burnett & Kidder, for complainant.

Abbett & Fuller, for defendant.

WALLACE, C. J. The defendant demurs to the complaint, and, pursuant to the Code of Procedure of this state, alleges as the ground of demurrer "that it appears upon the face of the complaint that the court has not any jurisdiction of the person of the defendant." The point sought to be presented, however, is that the defendant has not been properly served with process, in that the law of congress has been disregarded which provides that no civil suit shall be brought in any circuit court of the United States, "against an inhabitant of the United States, by any original process in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ." Rev. St. § 739.

The complaint avers that the defendant is a corporation organized and existing under the laws of the state of New Jersey, and is a citizen of that state. Upon this averment the defendant insists that it is to be presumed not only that the defendant is not an inhabitant of this judicial district, but also that it was not found here when the writ was served.

The demurrer is untenable for two reasons: *First*, no such presumption can be legitimately indulged. Although a corporation of another state cannot immigrate to this state it may exercise its franchises and transact business here upon such conditions as the laws

of this state may impose. It may consent to be "found" here for the purpose of being sued, within the meaning of the act of congress. *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369. The presumption that a corporation cannot be found out of the state which created it, is no more cogent than that an individual is not to be found out of the state of which he is an inhabitant; and no one has ever supposed such a presumption obtains when an individual is the party. *Secondly*, the point sought to be raised cannot be presented by a demurrer. The statute in question does not affect the general jurisdiction of the court. It confers a personal exemption or privilege upon a defendant which can be waived and is waived by a general appearance in the action. *Irvine v. Lowry*, 14 Pet. 296; *Flanders v. Ins. Co.* 3 Mason, 158; *Kitchen v. Strowbridge*, 4 Wash. C. C. 84; *Kelsey v. Pennsylvania R. Co.* 14 Blatchf. 89. How can it be ascertained on demurrer whether the party has been properly served with process or not, or whether the personal privilege has been waived? It is not the office of a complaint to exhibit the proceedings which have caused the defendant's appearance in the action. The complaint treats the defendant as present in court, and exhibits the issue between the parties. How the defendant came there is an extraneous matter. If the person selected as a defendant is one who is not subject to the jurisdiction of the court, and this is apparent upon the pleading, the objection may be reached by demurrer. If a party is subject to the jurisdiction it may be that jurisdiction has not been properly acquired; but this would present a question, not of pleading, but one of practice. The precise question was ruled in *Nones v. Hope Mut. Life Ins. Co.* 5 How. Pr. 96, where it was held that the defendant could not raise by a demurrer under the Code, upon the ground assigned here, the question whether he had been properly served with process.

This defendant is subject to the jurisdiction of the court. If the writ was irregularly served there was an adequate remedy by a motion to quash.

Judgment is ordered for plaintiff. Leave is granted the defendant to answer within 20 days upon payment of costs of the demurrer.

See *Anderson v. Shaffer*, 10 FED. REP. 266, and *Lovejoy v. Hartford Ins. Co.* 11 FED. REP., note, 69.

CADMAN v. PETER.

(Circuit Court, W. D. Michigan, S. D. June 10, 1882.)

CONVEYANCE—MORTGAGE BACK—ABSOLUTE DEED.

A conveyance of land by a deed absolute on its face for the expressed consideration of \$20,000, in notes of the grantee, which were received by the grantor,—the grantee giving back a mortgage of the same date as the deed to secure the payment of the notes given for the purchase price paid, and accepted by the grantor,—is an absolute deed and not a mortgage.

In Equity.

Charles F. Burton and C. I. Walker, for complainant.

Harrison Geer and Ashley Pond, for defendant.

WITHEY, D. J. The bill of complaint seeks to give to a deed the effect of a mortgage. In 1872 complainant borrowed of defendant his two promissory notes, payable to the order of Cadman at 90 days, for \$5,000 each. They were renewed by defendant from time to time for the accommodation of complainant. The last renewal was between the fifteenth and twentieth of October, 1875, for the same time.

On the twenty-fifth of October, the bill states, defendant agreed to loan to complainant the additional sum of \$20,000, by the notes of defendant payable at four and six months, and take a deed of 5,400 acres of land in Newaygo county, owned by complainant, of the estimated value of upwards of \$40,000, as security for the payment of both sums, \$10,000 and \$20,000. The deed, absolute in form, was executed by complainant and wife, and delivered to defendant on the day last named, and at the same time defendant gave his notes to complainant for \$20,000, the consideration named in the deed. The bill of complaint states the balance of the agreement as follows:

"Peter was to hold said land until such time as it might be sold at a profit, or for a greater sum than could be then realized, and when such time should come was to sell said land in the most advantageous manner possible, and out of the proceeds pay himself the said sums of \$10,000 and \$20,000, and interest and the taxes, and divide the surplus, if any."

The prayer is for an accounting, that the deed may be found to be an equitable mortgage, and that complainant may redeem. The answer denies the agreement to loan \$20,000; denies that the deed was given as security; and states that defendant purchased the land from complainant for the consideration of \$20,000, for which sum he gave his notes, and long since paid them. The answer denies that complainant has any interest whatever in the land, legal or

equitable, and says that complainant has not stated in his bill of complaint a cause of action. Complainant was, at the time of the alleged agreement, cashier in a bank in Detroit, and Peter was a lumber dealer in Toledo.

The case is an important one to the parties, and has been carefully considered as to the legal questions and the facts presented by the record. The first consideration relates to the nature of the transaction—whether the bill states a case which turns the deed into a mortgage, or mere security. Wherever there is a mortgage there is a right in the mortgagor or grantor to redeem the thing mortgaged. It need not be expressed, for the right to redeem will be implied wherever it is shown that property is transferred or pledged as security, unless the nature of the agreement forbids such implication. The agreement, set out in the bill of complaint and testified to by complainant, is, in effect, that Peter should take a deed of the land, effect a sale, and pay to Cadman one-half of the proceeds after deducting the purchase price or consideration, \$30,000, and the taxes and interest. Such an agreement is inconsistent with the right to redeem. Peter, by the agreement, was entitled to hold the land until sold by him, and then share in any profit he might obtain; rights wholly inconsistent with the idea that Cadman could redeem. This being the agreement of the parties, allowing it to be valid, the deed cannot be turned into a mortgage. Defendant's counsel cited *Baker v. Thrasher*, 4 Denio, 493; *Macauley v. Porter*, 71 N. Y. 173.

The appropriate remedy would seem to be to compel the grantee to execute his agreement whenever a sale of the land can be made at a considerable profit. If, on the other hand, such agreement is obnoxious to the section of the statute of frauds declaring that no trust concerning or in any manner relating to land shall be created by parol, then the agreement cannot be enforced specifically nor employed to turn this deed into a mortgage security. Comp. Laws 1871, § 4692. See *Saunderson v. Groves*, 13 Rep. 364, (Law Rep. Com. Pl. 284.)

Emerson v. Atwater, 7 Mich. 12, cited by complainant's counsel, is distinguishable from this case. The agreement there was that the grantee might sell the land to pay the indebtedness of the grantor to the grantee, but the latter was to reconvey whatever land remained unsold; and if the grantor should pay the debt all the land was to be reconveyed. There an express right to redeem was reserved. In my judgment the agreement, if valid, would make Cadman a beneficiary under the deed, and created a trust in Peter concerning or

relating to land, and not being in writing and properly signed is void under the statute of frauds.

But, under the evidence, complainant is not, in my opinion, entitled to relief, conceding his bill to state a good case. It is insisted for complainant, and proved, that Cadman and Peter held and had for years intimate and confidential relations; that Cadman was in great need of money, a fact known to Peter; that Cadman endeavored to effect a loan upon the land as security, and was unsuccessful, of which Peter was informed; and that Cadman had estimates of the value of the land which led him to regard it worth largely in excess of \$30,000, though in July previous he had purchased the land for about \$20,000.

Neither Cadman nor Peter had seen the land, and pine lands were not in much demand at that time, October, 1875. It must be said that Mr. Cadman's testimony supports the material allegations of the bill of complaint, and there is an item of testimony strongly corroborating the case of the complainant. Mr. Russell testifies that when the parties came to him to have the deed drafted, Peter said, in substance, that he was going to take the land as security and let Cadman have \$20,000 in addition to \$10,000 he already had, but wanted a deed so that he, Peter, could control the land.

On the theory that the bill states a good case, I should regard the proof sufficient, in the absence of other and controlling testimony, to overcome the *prima facie* effect due to the absolute form of the deed, although the testimony of a witness who speaks from recollection of a conversation after five or six years have elapsed is often not the safest evidence on which to form opinions. We are all conscious of the imperfection of our memory, and that our recollection of what we have heard said is apt to get mixed and misplaced, especially if we have heard statements on the same subject from different persons. It is familiar that mere recollection, unaided by written memorandum, is entitled to very much less weight than written declarations made at or about the time. And the written declarations of the parties, to which I shall refer, are to my mind wholly inconsistent with any such statement having been made by Peter as that he took the deed as security. I shall briefly call attention now to the facts which control my judgment.

1. The conveyance of the land was by a deed, absolute on its face, for the expressed consideration of \$20,000, to overcome the effect of which deed, and turn it into a mortgage, the evidence must be clear and convincing beyond reasonable controversy.

2. Peter gave back a mortgage to Cadman of the same date as the deed to secure payment of the notes given for the purchase price named, \$20,000. This mortgage was given by one party and accepted by the other; it therefore speaks for both of them. It may not be conclusive, but in the absence of fraud a mortgage back at the time of a conveyance ought to be nearly so, as a contemporaneous writing expressive of the intention of the parties. It adds to the effect of the deed as evidence that there was an absolute sale.

3. January 21st Cadman wrote to Peter in substance that he had drawn on the latter at one day's sight to take up one of two \$5,000 notes due that day, which Cadman could not get extended by renewal. The two \$5,000 notes alluded to are continuations of the accommodation paper loaned in 1872 by Peter for Cadman's benefit, and according to Cadman's testimony were secured, together with the \$20,000, by the deed to Peter. Peter had forwarded new notes to enable Cadman to retire the previous ones then about to fall due, and Cadman says in his letter that he had lodged one of the new notes as collateral to his draft. The draft directed the amount to be charged to Cadman's account. Peter replied January 22d, in which he says:

"I accepted your draft this morning. What do you think of making a draft on me at one day for \$5,000? This shows for itself how my notes are peddled in Detroit. Let me know if I must raise the money to pay this draft. I want you to send me something to *show that the two notes and this draft are for your benefit and for you to pay.*"

Cadman testified that it was part of the arrangement, when the deed was executed, that Peter was to pay the said two notes. Would Peter have written in the manner he did if those notes were for him to pay and Cadman had secured him for the amount? And why should Cadman be asked to give something to show what Peter had no right to ask? Cadman replied, January 24th:

"I am sorely mortified and grieved that this should be the case, but I am entirely powerless to act. I will do anything in my power. I will send you my notes or anything I have."

We do not understand why Cadman should acquiesce in Peter's demand for something to show that Cadman was to pay the paper and that it was all for his benefit, unless Cadman so understood the fact. This occurred only three months after the date of the deed and alleged agreement. Again, January 30th, Cadman's pecuniary affairs had reached a climax, and he wrote Peter:

"I return your note for \$5,000 herein. I cannot use it except to discredit you still more. I owe so much money outside I cannot stand the pressure: I am ruined and penniless. I console myself in your case that the *great bargain you made in the Newaygo lands* will in some great measure compensate you for the loss you must incur, for I cannot take care of the acceptance due early in February."

This acceptance was by Cadman of a draft drawn on him by Peter to pay the amount of the previous draft of Cadman on Peter at one day's sight, and was for \$5,000. Cadman returned one of the \$5,000 notes, which he did not use, and this left outstanding of the accommodation paper the acceptance and one note, aggregating \$10,000, besides the notes for \$20,000 given to Cadman at the date of the deed, and which had not yet matured. I am unable to reconcile the statements of this letter with Cadman's version of the understanding as to the purpose of the deed. He recognizes the fact that Peter had made "a great bargain" in the land in question—a bargain likely to compensate in a great measure the loss Peter must incur on account of Cadman. How had Peter made "a great bargain" in this land unless by a purchase of it and selling it for more than it cost? If Cadman had a beneficial interest, a right to redeem, or any sort of interest in the land, or in the proceeds of any sale, would he have made the statements of the letter? In his testimony he claimed the land to be worth at that time a large sum in excess of the amount he had received Peter's paper for. If the deed was understood to be security there was no reasonable ground for loss to Peter. No man of common prudence and understanding would have written such a letter while he regarded himself as the owner in equity of, or as having a valuable beneficiary interest in, the land.

A decree will be entered dismissing the bill of complaint for want of merits.

MCCAY v. LAMAR.

(Circuit Court, S. D. New York. April 21, 1882.)

1. CONFISCATION OF PROPERTY—RECOVERY OF AVAILS—CLAIM OF PROPORTION.

About the close of the late civil war a quantity of cotton was seized by the United States treasury agents and confiscated as property used in aid of the rebellion. Subsequently the owner of the cotton brought proceedings in the court of claims and recovered the value of the property so seized and sold, and afterwards died. After his death a claim was made by a third party as owner

of a portion of the cotton seized, and this action instituted against the executor of decedent to recover the value thereof. *Held*, that the will of decedent describing the lots claimed by him, and corresponding in amount with the claim made by such third party, and advertisements of the same through the newspapers requesting the owner to come forward, pay advances and expenses, prove ownership, and receive balance due; and the entries in the books of decedent of the same, as cotton owned by a party unknown,—are satisfactory proof of ownership in the party claiming his portion of the avails received by decedent.

2. SAME—CLAIM OF THIRD PARTY—RIGHT TO RECOVER.

Where it was shown by proof that the company, claiming a proportion of the avails of cotton seized by the government and sold, as property used in aid of the rebellion, but the avails of which had been afterwards reimbursed to the owner, was chartered for the purpose of owning, navigating, and freighting vessels engaged in foreign and domestic commerce, and also that it was engaged in running the blockade, but it did not show that the decedent, owner of the property confiscated and sold, or the defendant in this action, were in collusion with such company in any unlawful act, coupled with the fact of the recovery of the avails by defendant, no good reason is shown why the company or its assignee might not recover his proportion of the avails from the estate of the decedent.

3. SAME—ASSIGNMENT OF RIGHT OF ACTION.

Where an assignment was made by a company having a valid claim against the testator, who held the avails of the property in trust for the assignor, the company having a right to charge him as such trustee, and the disposition of the cotton seized having been directly within their corporate power, and the disposition of the avails impliedly within the same scope, and the president and all the directors joined in the execution of the assignment, *held*, sufficient to transfer the title to the claim to the plaintiff.

4. SAME—ACTION—MATERIAL ALLEGATIONS—MATTERS OF INDUCEMENT.

Where the material allegations of the bill are proved, an allegation that the executor received the cotton as executor of the testator, and held it as such when it was seized, when in fact he received it as surviving partner of testator, is mere matter of inducement, and the bill ought not, therefore, to fail when the material allegations are proved.

5. SAME—DECREE—INTEREST ON AVAILS.

The avails are the amount received for the plaintiff's cotton after deducting the charges and expenses of their recovery, the amount of expense to be ascertained by an accounting, but without interest, unless such avails were so invested as to bear interest, in which case the plaintiff would be entitled to the interest they bore.

In Equity.

Jos. B. Stewart, for orator.

Edward N. Dickerson, for defendant.

WHEELER, D. J. The defendant is the executor of the will of Gazaway B. Lamar, who owned, was interested in, and connected with large amounts of cotton which were seized in the southern states by United States treasury agents at about the close of the war of the

rebellion and sold, and the proceeds of which were turned into the treasury of the United States. He brought proceedings in the court of claims for the recovery of these avails, and therein recovered in April, 1874, the sum of \$579,343.51. The orator claims that \$23,844.88 of this sum was recovered for 136 bales which, subject to some claim for advances in which Lamar was interested, belonged to the Richmond Importing & Exporting Company, a corporation of Virginia, and that the right of that company to this cotton and its proceeds has been assigned to him. This bill is brought for the recovery of these avails, and the cause has been heard upon bill, answer, replication, proofs, and argument of counsel.

Three principal questions have been made in respect to the orator's right of recovery. One is as to whether these 136 balès were embraced in Lamar's recovery. Upon this question careful examinations of the proofs lead to the conclusion that they were. The proof of the proceedings in the court of claims would alone leave the matter somewhat in doubt; perhaps too much so for a foundation for a recovery. But while the case was pending he made his will, that of which the defendant is executor, containing these clauses: "It is my further will and desire, and I hereby direct my executors, to press my claims upon the government of the United States for the payment of the following cotton, which are now before the court of claims." Among other lots the following was specified: "136 bales cotton belonging to a gentleman in Richmond, Virginia, on which C. A. Lamar made advances." "When all the collections for this private cotton are made, and the amount placed to the credit of the several accounts, and interest charged to each account for my advances, then a division must be made of the net balance to the private account of each." After the recovery he advertises in the Richmond *Enquirer* for the owner of two parcels of cotton, and this lot was in two parcels, stating, "I have to-day received payment for the same from the United States treasury," and requesting the owner to come forward, pay advances and expenses, prove ownership, and receive the balance due. The proofs also show that he entered this cotton in his books as belonging to an owner unknown, but advertised for in Richmond, charged it there to the United States at \$23,844.88, and credited to the United States that sum as received for it. This clearly shows that his claim embraced this cotton; that he understood that he recovered for it; and altogether the proof is quite satisfactory that he did recover for it. The proof, including correspondence, shows quite clearly that

this cotton was purchased and forwarded to C. A. Lamar by a Mr. Hambleton, of Richmond, as agent for the Richmond Importing & Exporting Company, and was owned by that company.

Another question is as to whether that company could have recovered for this cotton or its avails, for, it is said, if that company could not its assignee could not. It is argued that it could not, because it was chartered and organized to run the blockade and aid the rebellion. The proof shows that it was chartered "for the purpose of owning, navigating, and freighting ships and other vessels engaged in foreign and domestic commerce, and of buying and selling the products and commodities so freighted or intended to be freighted," and that it was engaged in running the blockade, and in that way indirectly, if not directly, to some extent aiding the rebellion. But the proof does not show that C. A. Lamar or Gazaway B. Lamar received this cotton under any arrangement that it should be used in aid of the rebellion, or in any unlawful manner, such that it could not be recovered for in the hands of either; and the fact that it was recovered for by the latter shows that nothing he was doing with it forfeited or outlawed it. The corporation appears to have been lawful enough in itself. The business it was chartered for might be lawful or unlawful. In transacting unlawful business it would incur the consequences of its unlawful acts the same as a person, but such unlawful acts would not of themselves forfeit its property not involved in them, nor its other lawful rights. As the case is presented, no good reason is shown why this company might not, in its own name, have recovered these avails of the defendant's testator in his life-time, or of his executor since his decease.

The other principal question is whether the claim is so assigned to the orator that he can recover upon it in his own name. It is not questioned but that an assignee of a mere right of action or recovery may maintain a suit in equity upon it in his own name; but it is strenuously argued that no real and valid assignment of this claim is shown. That company had a valid claim against Mr. Lamar, the testator. He held these avails of the property of the company in trust for the company. The company had a right to charge him as its trustee of the funds, whether he was willing or not; he seems to have been willing, however, and to have charged himself so far as he could. The disposition of the cotton was directly within the corporate powers of the company; and the disposition of the avails of the cotton was impliedly within the same scope. The charter provided that "the affairs of the company shall be man-

aged by a president and board of directors, whose term of office, and their number, shall be determined and elected by the stockholders, and the said board of directors shall possess all the corporate powers of the company." The proof shows that no meeting of the company had been held, for any purpose, for many years, and that very little or no corporate business had been transacted within a number of years before the assignment. It does not show what term of office was determined upon for the directors. It does show by the testimony of the officers who the directors were at the time, which was competent for that purpose, especially as the proof also shows that the records were destroyed. One of them died. The president and all the others joined in the execution of the assignment. This seems to be sufficient to transfer the title to the claim to the orator.

The bill alleges that Gazaway B. Lamar received this cotton as executor of C. A. Lamar, and held it as such when it was seized. The answer denies that he was executor of C. A. Lamar, or held it as such. The proof does not support the bill, but sustains the answer on this point. He appears to have received it as surviving partner. This failure to sustain the bill in this respect is argued to be fatal to the right to recover upon the bill. This argument is not considered to be well founded. The orator does not seek to recover through C. A. Lamar, nor upon any right of his, nor upon any obligation incurred by him. How this cotton came into the hands of Gazaway B. Lamar is wholly immaterial in this case. The statement of it is mere inducement. The material facts are that the cotton belonged to the Richmond Importing & Exporting Company, and that the testator received the avails of it, and that the orator has succeeded to the right of the company to the avails. The bill ought not to fail when the material allegations are proved. The orator appears to be entitled to a decree for the payment of these avails. The avails are the amount received for this cotton after deducting the expenses belonging to it and the recovery for it. It is stipulated that the expense of recovering the whole sum was \$100,000. The expense of recovering this part may be in proportion and may not; it is not stipulated what it would be. That fact is to be ascertained. The orator claims interest on the avails, and it is included in the prayer of the bill. On the facts stated the orator is not entitled to interest as such. The testator was not a borrower of the money, nor was he wrongfully withholding it. Still, if these avails were so invested as to bear interest, the orator would be entitled to the interest they bore as a part of the avails. An account,

therefore, is necessary of the expenses and charges belonging to this cotton, and to the recovery of the sum received for it, and of the interest received, if any.

Let there be a decree that an account be taken of the charges and expenses chargeable to this cotton, and to the recovery of what was received for it, and of the interest received upon the avails of it, if any, and for the payment of the balance to the orator out of any assets of the estate in the hands of the defendant, with costs.

FISKE v. GOULD.

(Circuit Court, N. D. Illinois. May 15, 1882.)

1. PARTNERSHIP—DISSOLUTION—DEBTS A LIEN ON ASSETS.

Copartnership debts constitute a lien and an equitable charge upon whatever copartnership property existed at the time of the dissolution of the firm.

2. SAME—CREDITORS—RIGHTS MAY BE ASSERTED.

A creditor of a dissolved partnership, being a non-resident of the state, is not compelled to go into the state tribunal for the purpose of asserting his rights, but may proceed directly against the individual representatives of the deceased copartners, or any person having possession of the copartnership assets, no matter under what right he claims them. He may proceed at once, in equity, to have the assets marshalled and distributed to the creditors.

S. C. Boyce, for complainant.

Roberts & Hutchinson, for defendant.

BLODGETT, D. J., (*orally*.) The complainant, who is a citizen of the state of New York, charges by his bill that from February 1, 1878, to December 27, 1879, William R. Gould and M. Brooks Gould were copartners, doing business in this city, as merchants and dealers in ornamental hardware, under the firm name of W. R. & M. B. Gould, and that during such time the complainant sold and delivered the firm goods to the value of \$5,011.60, for which the firm became justly indebted to him, and that \$2,511.60 of such indebtedness remains due and wholly unpaid. That on the twenty-seventh day of December, 1879, M. Brooks Gould died intestate in this city, and that afterwards—that is, on the twelfth of January, 1880—the defendant Newbury C. Hills was, by the probate court of Cook county, duly appointed sole administrator of the estate of said M. Brooks Gould, and duly accepted and entered upon the duties of his office; that on the fifteenth of June, 1880, said William R. Gould died in this city, leaving a will, whereby defendant Amelia Gould was duly appointed

his sole executrix; that the will has been duly admitted to probate in Cook county, and letters testamentary issued to said Amelia Gould; that at the time of the death of M. B. Gould the firm was possessed of a large amount of partnership assets; that on the appointment of Hills as administrator of M. Brooks Gould he took possession of a large part of the stock in trade and assets of the firm, and inventoried and treated them the same as the individual assets of said M. B. Gould; that some part of the assets of the firm also came to the possession of the executrix of W. R. Gould, and are now, either the original assets or the proceeds thereof, in the possession of the said Amelia Gould as executrix.

The bill further charges that the copartnership had not been dissolved up to the time of the death of M. B. Gould, although M. B. Gould had for some time prior to his death the exclusive possession of the partnership property, and conducted the business and excluded William R. Gould therefrom, and negotiations were pending between M. Brooks and William R. Gould for a settlement of their partnership business at the time of the death of M. B. Gould. It is also charged that both the partners were insolvent at the time of their respective deaths; that defendant Hills, as administrator of M. B. Gould, and defendant Amelia Gould, executrix of William R. Gould, have paid none of the copartnership debts, and have treated the copartnership assets which came to them respectively as individual assets of the respective decedents, although the copartnership assets which came to the hands of defendants are sufficient to pay all, or nearly all, the copartnership debts; and that the copartnership creditors are entitled to be paid the full proceeds of such copartnership property. The bill prays that the defendants account for the copartnership assets which came to their hands respectively; that a receiver be appointed to take possession of such copartnership assets and administer them in the interest of the copartnership creditors.

To this bill the defendants have demurred, on the ground that the subject-matter of this suit is solely within the jurisdiction of the probate court of Cook county; that such court has ample power to marshal and distribute the assets according to the equities and priorities of the several individual and copartnership creditors, and to direct the defendants in relation thereto, and therefore this court cannot entertain complainant's bill, but complainant should apply to the probate court for such order in regard to the partnership assets as his equities entitle him to.

The case made by the bill shows defendants to be trustees for the

creditors of the firm to the extent of whatever copartnership assets have come to their hands. It shows that before the dissolution of the firm the partners died, leaving copartnership property, which is now in the possession of their individual representatives, and that these assets ought to be applied to the payment of the copartnership debts. There can be no doubt, I think, of the general principle that the copartnership debts constitute a lien and an equitable charge upon whatever copartnership property existed at the time of the dissolution of the firm. This position is fully sustained in *Menagh v. Whitwell*, 52 N. Y. 146, and *Rainey v. Nance*, 54 Ill. 29, and other cases which might be cited. While it may be true, as contended by the defendants, that the probate court has ample power under the statute of Illinois to direct the application of copartnership property to the payment of the debts of the firm, yet the complainant, being a citizen of the state of New York, is not compelled to go into the state tribunal for the purpose of asserting his rights, but may proceed directly against the defendants, or any person having possession of the copartnership assets, no matter under what right he claims them. Under the authorities, there is no necessity for this complainant, the principal debtors being dead, to obtain judgment before resorting to a court of equity, but he may proceed at once, in equity, to have the assets marshalled and distributed to the creditors entitled to them.

There is no doubt but what, under the authorities, the marshalling of the assets of copartners, or of deceased debtors, for the purpose of applying those assets to the payment of indebtedness of creditors, is one of the original subjects of equity jurisdiction, and it has been decided often that the statutory provisions of the various states, providing the method by which estates may be settled by the state, probate, and surrogate courts, do not deprive a court of equity of jurisdiction, and especially courts of the United States.

The subject was fully discussed by the supreme court in 7 Wall. 425.

I have no doubt in this case, upon the charges contained in the bill, showing that the assets of this copartnership have gone into the hands of these defendants, whether they act under the authority of the probate court, or whether they are acting without authority, an action is maintainable by the creditors of the firm for the purpose of reaching the assets and applying them to the payment of the copartnership debts.

The demurrer to the bill is therefore overruled.

CLAFLIN and others v. McDERMOTT and others.

(Circuit Court, S. D. New York. June 14, 1882.)

1. ACTION—ANCILLARY SUITS—ENFORCING JUDGMENT.

Actions in aid of an execution at law are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment, or to remove obstacles to its enforcement.

2. FOREIGN JUDGMENTS—FORCE AND EFFECT.

A judgment of one state has no force in another state save what it derives from the laws of such state, and the provision of the constitution of the United States which relates to its effect applies only to its effect as evidence.

3. EQUITY—REMEDY—WHEN CREDITOR MAY INVOKE.

A creditor at large cannot invoke the jurisdiction of equity to enforce his claim unless upon some of the recognized grounds of trust or administration of equitable assets. Unless such grounds exist his remedy is at law, and equity will not assist him until that remedy is exhausted.

4. CREDITOR'S BILL—FOREIGN JUDGMENT.

A judgment obtained in another state cannot be the foundation for a creditor's bill in this state. It must be sued over before it becomes a judgment for the purposes of any remedy here, at law or in equity.

5. JURISDICTION—WHEN NOT ASSUMED.

This court will not assume jurisdiction to examine into a fraudulent perversion of the proceedings of a court of a distant state, and set aside transfers based upon these proceedings, when the actions, the transactions, and the property are all within that state.

Vanderpoel, Green & Cuming, for plaintiffs.

E. R. Meade, for defendants.

WALLACE, C. J. The bill in this case is filed to set aside the transfer of certain personal property made at San Francisco, California, by Kennedy & Durr, to MacDermot, by means of collusive judgments and sales under executions issued thereon, the complainants being creditors of Kennedy & Durr, and having recovered judgment in a state court in California against Kennedy & Durr, upon which an execution has been returned unsatisfied. By a demurrer, the question is presented whether the bill can be maintained here, no judgment having been obtained or execution issued in this court, or in any court of the state. Actions like the present, in aid of the execution at law, are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment or to remove obstacles to its enforcement. Because this is the nature of such an action, it has been decided that such a suit may be maintained in a federal court although all the parties reside in the state where it is brought, the judgment in the original suit having been recovered in the federal court in which the creditor's suit was brought.

Hatch v. Dorr, 4 McLean, 112. It is, therefore, difficult to understand how such a suit can be maintained in any court which does not exercise an auxiliary jurisdiction over the court in which the original suit was brought. Authorities are found, however, upon both sides of the question which is thus presented.

In *Tarbell v. Griggs*, 3 Paige, 207, the court of chancery of this state refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment obtained in the United States circuit court for the southern district of New York, upon which an execution had been returned unsatisfied. The judgment was treated as a foreign judgment, and as standing on the same footing with a judgment of the court of another state.

In *Davis v. Bruns*, 23 Hun, 648, there was a similar adjudication. There the plaintiff brought his action in the supreme court of this state to set aside an alleged fraudulent transfer of real estate, having obtained a judgment against the grantor in the United States district court for the southern district of New York, and an execution on the judgment having been returned unsatisfied. In both of these cases it was held that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution upon a foreign judgment.

On the other hand, in *Wilkinson v. Yale*, 6 McLean, 16, a creditor's bill was maintained in the United States circuit court founded upon a judgment of a state court of the state in which the federal court was sitting. The decision was placed upon the power of the court to adopt a remedy given by the law of the state, when the remedy was one appropriate for the exercise of a court of equity; but it was also assumed that the bill could be maintained irrespective of the state statute.

The cases in the courts of New York seem most consonant with principle. Obviously the complainants are merely creditors at large of the defendants in the California judgment. The judgment of another state has no force in this save what it derives from the laws of this state and the provision of the constitution of the United States which relates to its effect as evidence. It ranks here as a simple contract debt. It does not have the force and operation of a domestic judgment, except for the purposes of evidence, beyond the jurisdiction where it is obtained. *McElmoyle v. Cohen*, 13 Pet. 312. It will not be contended that a creditor at large can invoke the jurisdiction of equity to enforce his claim unless upon some of the recognized grounds of trust or administration of equitable assets. Unless some

of these grounds exist the remedy of the creditor is at law; and equity will not assist him until that remedy is exhausted. The remedy at law cannot be exhausted by the recovery of a judgment in a foreign jurisdiction, and by fruitless efforts to enforce it there. Except as a binding adjudication between the parties upon the subject-matter of the suit, the judgment of one of our sister states has no operation here upon the rights or the remedies of the parties to it. It cannot be a foundation for a creditor's bill here any more than a judgment recovered in England or in Canada. It must be sued over here before it becomes a judgment for the purposes of any remedy here at law or in equity.

This conclusion is reached with less reluctance in view of the practical objections which would exist if foreign judgment creditors were permitted to resort to this jurisdiction to remove obstacles in the way of their legal remedies. These obstacles always exist in the jurisdiction where the judgment is obtained. Frequently their removal involves the consideration of the force and effect of remedies and rights created by local law, which are more appropriately adjudicated by the local tribunals. The present case affords an illustration in point. This court is asked to examine into a fraudulent perversion of the proceedings of a court of a distant state, and set aside transfers based upon these proceedings, when the actors, the transactions, and the property are all within that state. Such a jurisdiction should not be willingly assumed.

The demurrer is sustained.

NEW BRUNSWICK & CANADA R. CO. v. E. S. WHEELER & CO.

(Circuit Court, D. Connecticut. June 8, 1882.)

1. CONTRACT EXECUTORY—PERFORMANCE—REPUDIATION.

In an action on a contract to deliver goods, when the plaintiff performs, the defendant having continuously called for execution of the contract, it is not competent for the latter to refuse to accept performance; but if, upon notice by the promisor of an executory contract that he will not perform, the promisee accepts the situation and treats the contract as at an end, the promisor cannot afterwards, by changing his mind, compel the promisee to accept performance.

2. SAME—RIGHTS OF PROMISEE UNDER.

The promisee may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for the consequences of non-performance, remaining subject to all

his own obligations under it, or he may treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it for such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

John W. Alling and Chas. R. Ingersoll, for plaintiff.

John S. Beach and Edward J. Phelps, for defendants.

SHIPMAN, D. J. This is an action at law which was tried by the court, the parties having waived a jury trial by the written stipulation which is a part of the record. The facts in the case which are found to be true, the testimony which was objected to, the rulings of the court upon said objections, and the exceptions to said rulings, are as follows:

The averments of the complaint in regard to the citizenship, residence, incorporation, and partnership of the respective parties are true.

The New Brunswick & Canada Railroad Company is a corporation which owns and manages a railroad running from St. Stephens, in New Brunswick, to Holton, in the state of Maine, a distance of about 100 miles. At the time of the transactions hereinafter mentioned the corporation had eight directors, who owned nearly all of the capital stock of the company. At the organization of the company, a few years ago, there were but eight owners. The business of said directors was transacted very often without the formality of votes, but by verbal instructions to the president, and more after the manner of a partnership than of a corporation.

In 1878 the directors commenced to relay the road with new steel rails, and 1,000 tons were bought for that purpose. On July 24, 1879, the directors passed the following vote: "Resolved, that the president be authorized to purchase 2,000 tons of steel rails, if he deems it advisable to do so."

Negotiations for this purpose were thereafter commenced, which resulted in a contract, executed about February 6, or 7, 1880, with an English firm for the purchase of that amount of steel rails. They were to arrive some time thereafter. As reliance was placed upon the money to be obtained from the sale of the old rails for the payment of the new, the directors of the corporation, in conversations and by verbal instructions given from time to time before the completion of said contract, both at directors' meetings and at occasional interviews elsewhere, but not by vote passed at any meeting, verbally authorized and instructed their president to sell the old rails belonging to said company and then upon the road-bed, and gave him full authority to do whatever was necessary for that purpose. When Mr. James Murchie, the vice-president of said company, was about to leave St. Stephens for New York and the eastern cities in January, 1880, upon business of his own, the president gave him express instructions to sell said old rails, the approximate weight of which was well understood, for 75 tons of old rails would be taken up by the laying 100 tons of new rails, and in pursuance of said instructions said Murchie, as vice-president of the company, entered at New Haven on January

31, 1880, into the written contract with the defendants for the sale of 1,000 tons, and also for the sale of 200 to 600 tons, which contract is contained in plaintiff's Exhibits 1 and 2 hereto annexed.(a)

On February 16, 1880, at a meeting of the directors of the plaintiff corporation, the following votes were passed:

"Resolved, that the contract made by Mr. Murchie with Messrs. E. S. Wheeler & Co., of New Haven, be agreed to; a memorandum to this effect to be furnished to Mr. Murchie, to be forwarded to Messrs. Wheeler & Co.

[After discussion upon another subject:]

"Resolved, that the following sale of old rails made by Mr. James Murchie to Messrs. E. S. Wheeler & Co. be confirmed:

"Sold E. S. Wheeler & Co. 1,000 tons of old rails for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars (\$30) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co., and also 200 to 600 for delivery in New York or New Haven, between August 1st and October 1st, at twenty-eight dollars (\$28) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co.

"In each case, cash against invoice, bill of lading; insurance policy in satisfactory company."

On February 17, 1880, Mr. Murchie sent the defendants the letter hereto annexed, marked Defendants' Exhibit B.(b) On February 23, 1880, the defendants replied to said letter of Murchie, and sent to him, as vice-president, the letter hereto annexed, marked Defendants' Exhibit D.,(c) which letter was duly received, but to which no reply was made. No other communication, verbal or written, passed between the plaintiff and defendants until about June 10, 1880, when Mr. Murchie called upon the defendants and asked them whether they would have those rails delivered in New Haven or New York, and said that the defendant was ready to deliver them, and that the tons were to be 2,240 pounds each.

The defendants declined to receive any rails upon the ground that the plaintiff had repudiated the contract of January 31st, or that it had ceased to exist by the plaintiff's act. The plaintiff thereupon sent the defendants the letter of June 14, 1880, hereto annexed and marked Defendants' Exhibit E.,(d) to which the plaintiff replied by letter of June 15, 1880, hereto annexed and marked Defendants' Exhibit F.(e)

On June 30, 1880, the plaintiff tendered in fact, under the contract of January 31, 1880, to the defendants a cargo of old iron rails of about 65 tons, of 2,240 pounds to the ton, at the city of New Haven, and the defendants declined to receive the same, or to say where they should be delivered, whether at New Haven or New York, or to give any instructions whatever on the subject.

The plaintiff, on August 10, 1880, sent to the defendant the letter of that date, hereto annexed and marked Plaintiff's Exhibit 3,(f) to which the defendant replied by letter of August 21, 1880, hereto annexed and marked Plaintiff's Exhibit 4.(g) All the letters hereinbefore mentioned were duly and seasonably received by the respective parties to whom they were sent.

(a) See *post*, 384.

(b) *Id.*

(c) *Id.* 385.

(d) *Id.* 386.

(e) *Id.*

(f) *Id.*

(g) *Id.* 387.

The defendants never received, but always, after June 10, 1880, refused to receive, any of said 1,000 tons, or of said 600 tons, either at the city of New York or at New Haven, although the same were duly and properly tendered to them on June 10th, June 14th, June 30th, and August 10th. The plaintiff had at said respective dates, and before August 1, 1880, 1,000 tons of rails for delivery under the contract of January 31, 1880, and also had 600 other tons of rails between August 1 and October 1, 1880, for delivery under said contract, and was, at said respective dates upon which tender was made, able, ready, willing, and anxious to deliver said iron, and to comply with the contract of January 31st by the delivery of 1,000 and 600 tons, of 2,240 pounds each.

It was agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the same, to which evidence and to the proof of which fact the plaintiff duly and seasonably objected upon the ground that the statutes hereinafter quoted show the meaning of the word "ton," but the court admitted the same, to which ruling the plaintiff duly and seasonably objected) that a ton of iron rails or other scrap iron, when contracted for, or bought and sold in the markets of the cities of New York and of New Haven, by the uniform usage or custom of those markets, means, and on January 31, 1880, meant, a ton of 2,240 pounds, unless the term of the contract evidenced a different meaning upon its face.

The statute of the state of Connecticut, in force on January 31, 1880, and still in force, provides as follows: "In the sale of articles by avoirdupois weight, 100 pounds shall constitute a hundred weight, and 2,000 pounds shall constitute a ton; and the aliquot parts of a hundred weight and of a ton shall be reckoned accordingly." By the statutes of New York, Maine, and the dominion of Canada, in force upon January 31, 1880, and still in force, 2,000 pounds constitute a ton. The parliament of the dominion of Canada has control of weights and measures throughout the dominion, and its statute provides that every contract made in the dominion for any merchandise agreed for by weight or measure shall be deemed to be made and had according to one of the dominion weights or measures, ascertained by said act, and if not so made, according to the metric system.

On January 31, 1880, and when the contract of that date was entered into by and between the said Murchie, acting in behalf of and as the agent of said company, and E. S. Wheeler, one of the defendants, and acting for said firm, each of said parties contracted for the sale and purchase of gross tons, in accordance with said custom, and each understood that he was contracting for tons of the customary weight,—that is, of 2,240 pounds each,—and each knew that the word "tons," as used in said contract, meant in his mind tons of 2,240 pounds each, and there was no misunderstanding between said persons as to the true intent and meaning of said contract.

The plaintiff duly and seasonably objected to any evidence in regard to custom or usage, or the understanding of Mr. Murchie as to the meaning of the word "ton," but the same was admitted, and to said ruling the plaintiff duly and seasonably excepted.

It was agreed that the list hereto annexed and marked Plaintiff's Exhibit

No. 6* correctly shows the market price per ton of old iron rails in the markets of the cities of New York and New Haven, at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of 2,240 pounds, the duty on such iron being eight dollars per ton of 2,240 pounds, and included in said market price.

The damage to the plaintiff by reason of the refusal of the defendant to accept said 1,000 tons was the sum of \$11,000; and the damage by reason of their refusal to accept said 600 tons was the sum of \$5,400.

The defendants' counsel asked Mr. E. S. Wheeler, the only defendant who made the contract or had any knowledge of the business, the following questions, to each one of which the witness gave the answers respectively written in response to the respective questions. To each one of said questions, and to each one of said answers, the plaintiff objected upon the ground that it was immaterial. The question and answer No. 2 was admitted to contradict a single statement in the testimony of Mr. Murchie. No. 8 was admitted, as was also the other testimony in regard to the meaning of the word "tons" as used in said contract, because a decision upon the question of admissibility became immaterial in view of the plaintiff's conduct in tendering gross tons, and to avoid dispute agreeing to the defendants' construction of the contract. No. 9 was excluded. The remaining questions and answers were considered to be properly in evidence for the purpose of enabling the court to ascertain the effect of the silence of the plaintiff after the letter of February 28th upon the defendants' previous position in regard to the contract, the previous position having been that of affirmance. To the rulings against the objection of the plaintiff, and to the ruling in favor of the objection of the plaintiff, the defendants duly and seasonably excepted.

No. 1. Between January 21, and February 17, 1880, did you have any opportunities of disposing of the 1,000 tons of rails about which you had contracted with the plaintiff? *Ans. No. 1.* We had repeated opportunities. Mr. Murchie called on Saturday, January 31st, and on Monday we could have sold the rails for that future delivery at \$4 per ton profit, and on Tuesday at \$5 per ton profit.

No. 2. Do you know of any manufactory in New Haven which uses old iron rails? *Ans. No. 2.* No.

No. 3. State the object for which you bought these rails. *Ans. No. 3.* I bought these rails to sell, not to manufacture.

No. 4. Had you other opportunities to sell these rails? *Ans. No. 4.* We had other opportunities to sell, but these offers were firm offers, made by responsible parties.

No. 5. Why did you not take these offers? *Ans. No. 5.* Because Mr. Murchie had come to us a stranger, representing a company of which we had never before heard, bringing no letter of introduction, and showing by his conversation that he was not familiar with old rails, and because he had sold them at much less than the market price of the day. I had grave suspicions whether we should get the property, and the amount involved was so large as to make it prudent for us to investigate the character and responsibility of the sellers. That investigation we could not make without some delay.

No. 6. After the letter of February 17th did you make any attempt to sell the iron? *Ans. No. 6.* No.

* See post, page 387.

No. 7. Could you have sold it at a profit at that time? *Ans. No. 7.* We could have sold at a large profit.

No. 8. State in regard to the truth of the statements made in your letter of February 28th. *Ans. No. 8.* The statements made in our letter of February 28th are true. It correctly states our understanding of the contract.

No. 9. When did you first hear of the statute of Connecticut in regard to the meaning of the word "ton?" *Ans. No. 9.* I first heard of the statute of Connecticut about a month ago, from Mr. Beach.

The statutes of New Brunswick, (Consolidated Statutes, 750,) provide that "the contract of the agent of any corporation within the scope of his authority and the acts of a corporation shall be valid, though not authenticated by their seal."

The plaintiff did not intend by its votes February 16th or by the letter of February 17th to repudiate or abandon the contract of January 31st. It did attempt by said votes to draw from the defendants a modification of said contract. The defendants did not, by word or act, prior to June 10th, change their previous position in regard to the contract, which position is stated in their letter of February 28th.

The conclusion to which I have come from the foregoing facts are as follows:

1. That the president of the company was fully authorized to take all steps necessary to sell the iron rails, although the authority was not conferred by vote of stockholders or directors; that this power to sell was not limited to his personal action, but that he was also fully authorized to employ substitutes or agents, and that James Murchie was duly authorized to make the contract of January 31, 1880.

2. That the questions whether parol evidence was admissible to explain the meaning of the word "ton," as used in the contract of January 31, 1880, in view of the statutes hereinbefore specified, or whether parol evidence was admissible to alter or vary the meaning of the word from that given in said statutes, or either of them, are immaterial, inasmuch as the plaintiff, by its conduct in tendering tons of 2,240 pounds each, and by its letters of June 14th and August 10th, agreed, for the purpose of avoiding dispute, to the defendants' construction of the contract, and, in fact, admitted that the contract should be taken to mean gross tons.

3. Neither the votes of February 16, nor the letter of Mr. Murchie of February 17, 1880, can fairly be considered a repudiation of the contract, or an attempt to abandon it. The directors did not intend or want to repudiate or abandon, and no confirmation of the contract was needed, but they desired, by an apparent misunderstanding of the terms of the contract, to see whether the defendants would consent to such a modification of it as was suggested by the addition of the words "of 2,000 pounds." But if these votes were a repudiation,

the defendants, by their letter of February 28th, insisted upon the execution of the contract according to its true intent; and if it was then permitted to them to treat the contract as at an end by reason of the disingenuous conduct of the plaintiff's directors, they refused to do so, and continuously held the plaintiff to strict performance. When the plaintiff performs, the defendant having continuously called for execution of the contract, it is not competent for him to refuse to accept performance. But if, upon notice by the promisor of an executory contract that he will not perform, the promisee accepts the situation, and treats the contract as at an end, the promisor cannot afterwards, by changing his mind, compel the promisee to accept performance.

4. The silence of the plaintiff, after the letter of February 28th, raises a more doubtful question; but, I think, assuming that this silence amounted to a notice of non-intention on its part to complete the contract for gross tons, that the defendants, by their conduct, treated such notice of non-intention as inoperative, and insisted upon performance, and cannot, when the plaintiff is ready and willing to perform, refuse to accept its tender. The natural effect of the plaintiff's silence, after the letter of February 28th, was to create great uncertainty, and to cause consequent annoyance and pecuniary loss to the defendants. Such pecuniary loss is not proved here, for I do not regard Mr. Wheeler's answers to questions 6 and 7 as proving any loss to which he was subjected by the silence of the plaintiff, but cases may easily arise where such silence would be very injurious to the other contracting party, and would be very censurable. Assuming that the defendants would have been justified in regarding this silence as a continued affirmation of the construction which was given in the vote of the directors to the contract, and as a wrongful putting an end to it, they were silent on their part, and continued to stand on the letter of February 28th, demanding performance. When the plaintiff performs, if the defendant has not declared by his words or conduct, in regard to the subject-matter of the contract, that it is at an end, but has kept it alive and demanded fulfilment, he is bound to accept of performance. The law on the subject is stated in a recent English case by Chief Justice Cockburn as follows:

"The law with reference to a contract to be performed at a future time, when the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. Delatour* and the *Danube & Black Sea Co. v. Xenos* on the one hand, and *Avery v. Bowden*, *Read v. Hoskins*, and *Barwick v. Buba* on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the

other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

5. The plaintiff is entitled to judgment for the sum of \$16,400, with interest at 6 per cent. upon \$11,000 from August 1, 1880, and interest upon \$5,400 from October 1, 1880.

PLAINTIFF'S EXHIBIT No. 1.

NEW HAVEN, January 31, 1880.

James Murchie, Esq., Vice-President New Brunswick & Canada Railroad—
DEAR SIR: We have this day bought of you, as representative of the New Brunswick & Canada Railroad Company, 1,000 tons old rails, for delivery in New York or New Haven, (at our option,) at \$30, without duty, and delivery to be before August 1st, and also two (2) to six hundred tons for delivery in New York and New Haven, between August 1st and October 1st, at \$28, without duty. Terms, in each case, cash, against invoice, B. L., and insurance policy in satisfactory company.

Very respectfully,

E. S. WHEELER & Co.

PLAINTIFF'S EXHIBIT No. 2.

NEW HAVEN, January 31, 1880.

E. S. Wheeler & Co., New Haven: We hereby accept your order of this date, and will deliver rails at price and on terms named.

Respectfully,

NEW BRUNSWICK & CANADA R. R. Co.

JAMES MURCHIE, Vice-President.

DEFENDANTS' EXHIBIT B.

ST. STEPHENS, February 17, 1880.

Messrs. E. S. Wheeler & Co., New Haven—DEAR SIRS: I herewith enclose a copy of resolution passed at our meeting of directors yesterday. This confirmed the sale "made by me to you," by the company, which was done on my arrival home. The car wheels and chains that we had on hand were sold before I came home; we will have a large quantity by the time we ship our rails. Please acknowledge the above.

Yours, truly,

JAMES MURCHIE.

NEW BRUNSWICK & CANADA RAILROAD COMPANY.

Minute of a Resolution Passed at a Directors' Meeting, February 16, 1880.

Resolved, that the following sale of old rails, made by Mr. James Murchie to Messrs. E. S. Wheeler & Co., New Haven, Connecticut, be confirmed:

"Sold Messrs. E. S. Wheeler & Co. 1,000 tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars (\$30) per ton of 2,000 pounds, the duty to be paid by Wheeler & Co.; and also 200 to 600 tons for delivery in New York or New Haven between August 1st and October 1st, at twenty-eight (\$28) per ton of 2,000 pounds, the duty to be paid by Wheeler & Co. In each case, cash, against invoice, bill of lading. Insurance policy in satisfactory company.

(True copy.)

"F. H. TODD, President."

DEFENDANTS' EXHIBIT D.

NEW HAVEN, February 28, 1880.

James Murchie, Esq., Vice-President New Brunswick & Canada Railroad Company, St. Stephens, Canada—DEAR SIR: We received duly your favor of the seventeenth instant, enclosing what purports to be a certified copy of a resolution adopted by the directors of the New Brunswick & Canada Railroad Company in reference to the sale of old rails made by you, on behalf of that company, to us, on the thirty-first ultimo. We assume that this resolution was passed merely as matter of form, and a copy has been sent us for our information solely, as no mention was made at the time of the negotiations that you acted subject to any approval by your company. We understood then, and understand now, that the sale made at that time on behalf of your company was an absolute and final unconditional sale. We do not understand further that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore, we understood at the time, and now understand, that the number of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not 2,000, but 2,240. Old rails, like other scrap and like pig iron, are bought and sold by the gross ton, not only in this market, but in every foreign market. The custom of the trade fixing 2,240 as the standard number of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the contract of your company with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your company, and in "gross," not net tons. We make no doubt but that your understanding of that contract is in accord with ours, and that in so far as this resolution fixes a different number of pounds for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly yours,

[Signed]

E. S. WHEELER.

DEFENDANTS' EXHIBIT E.

69 CHURCH STREET, NEW HAVEN, CONN., June 14, 1880.

Messrs. E. S. Wheeler & Co.—DEAR SIR: We now have ready for delivery the 1,000 tons of old rails sold you January 31, 1880, by contract of sale of that date, made by you and James Murchie, as representing the New Brunswick & Canada Railroad Company. By the terms of that contract the 1,000 tons are to be delivered before August 1st next in New York or New Haven, at your option.

You will please inform us at your early convenience at which of those ports the rails shall be delivered.

In your letter to James Murchie, as vice-president of our company, of February 28th, last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 pounds, or the gross ton. Now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons, at gross weight of 2,240 pounds to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

NEW BRUNSWICK & CANADA RAILROAD CO.

By F. A. PIKE, Special Agent.

DEFENDANTS' EXHIBIT F.

(Copy.)

NEW HAVEN, June 15, 1880.

New Brunswick & Canada Railroad Co.—GENTLEMEN: Your letter of yesterday, advising that you are ready to deliver to us 1,000 tons of old rails, and asking us to designate a port of delivery, is received. As we do not recognize the existence of any such contract of sale as your letter contemplates, we have no instructions to offer upon the subject. It is true that we tried last winter to buy of you 1,000 gross tons of old rails, at a price which would have netted us a large profit; but this we had to lose, as your company insisted they were selling net tons, and no contract resulted upon which we could base our sales.

Very truly yours,

E. S. WHEELER & Co.

PLAINTIFF'S EXHIBIT NO. 3.

69 CHURCH STREET, NEW HAVEN, CONN., August 10, 1880.

Messrs. E. S. Wheeler & Co.—DEAR SIR: By the terms of your contract with the New Brunswick & Canada Railroad Company of the date of January 31, 1880, you bought of the company 200 to 600 tons of old rails, to be delivered to you in New York or New Haven between August 1 and October 1, 1880. We now have 600 tons of such old rails ready for delivery to you, and respectfully inquire at which port, New York or New Haven, you wish the delivery to be made.

In your letter to James Murchie, as vice-president of said railroad company, of February 28th last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 pounds, or the gross ton. Now, without waiving any of our rights under that contract, but to avoid dispute,

we tender you the delivery of the 600 tons at gross weight of 2,240 pounds to the ton, and ask your determination whether the delivery shall be made in New Haven or in New York, or whether, in view of your action concerning the 1,000 tons mentioned in the same contract, a delivery at all shall be made.

Respectfully yours,

THE NEW BRUNSWICK & CANADA RAILROAD COMPANY.

By JOHN W. ALLING, Attorney.

PLAINTIFF'S EXHIBIT NO. 4.

NEW HAVEN, August 21, 1880.

The New Brunswick & Canada Railway Company—GENTLEMEN: We have your favor of the 10th inst., wherein you ask shipping instructions for certain old rails under the terms of an alleged contract with us. Upon the fifteenth of June last, in answer to a similar request from you, we stated that we did not recognize the existence of any such contract and that we therefore had no instructions to offer. Our views regarding this matter have undergone no change since our last letter on this subject, and we do not see that we can give you any further directions regarding the disposition of the rails named by you.

Truly yours,

E. S. WHEELER & Co.

PLAINTIFF'S EXHIBIT NO. 6.

NEW BRUNSWICK & CANADA RAILROAD COMPANY vs. E. S. WHEELER & Co.

(*United States Circuit Court, District of Connecticut.* April Term, 1882.)

In the above case it is agreed that the following list correctly shows the market price per ton of old iron rails in the markets of the cities of New York and of New Haven, at the dates respectively as given, and that a ton of such rails or other scrap iron, when quoted for the market price in said markets, means a ton of 2,240 pounds, the duty on such iron being eight dollars per ton of 2,240 pounds, and included in said market price.

It is also agreed (subject to the plaintiff's right of objection to the admission of evidence to prove the fact) that a ton of said rails, or other scrap iron, when contracted for, or bought or sold in said market by the uniform usage or custom of those markets, means, and at the date of said alleged contract in controversy meant, a ton of 2,240 pounds, unless the terms of the contract evidenced a different meaning upon its face.

PLAINTIFFS,

By INGERSOLL & ALLING.

Defendants reserving right to offer evidence consistent with stipulation.

By JOHN S. BEACH.

PRICE OF OLD T RAILS IN NEW YORK AS REPORTED IN THE NEW YORK COMMERCIAL BULLETIN.

Feb'y.	4, '80.	At 43 and 43.50.	May	29, '80.	26.00 general price.
"	7, '80.	42.50 and 43.	June	2, '80.	About 26.00 for spot parcels.
"	11, '80.	42 and 43.	"	9, '80.	24 to 24.50.
"	14, '80.	42 and 42.50.	"	12, '80.	24.50@25.00, spot lots.
"	18, '80.	42.50.	"	16, '80.	24.50@25.00, but the bulk of the supply held for 26.00
"	21, '80.	Sales of 3,000 tons 42, to arrive; 3,000 tons do. at a shade under 42.50.	"	19, '80.	24.50 to 25.00.
"	25, '80.	42.50; steady.	"	23, '80.	23.50@24.50.
"	28, '80.	42.00; best bids 50c. to 1.00 under; we learn of 1,000 at 41.50, spot.	"	26, '80.	24.00@24.50.
March	3, '80.	41.00 and 42.00.	"	30, '80.	We hear of T offered at 23.50.
"	10, '80.	40 to 41.	July	3, '80.	24.00@24.50.
"	13, '80.	As low as 40.00 for shipt., while up to 40.00 for spot.	"	7, '80.	23.50 to 24.50.
"	17, '80.	117½ shillings c f i; we learned of 3,000 tons at 39.00 and 40.00.	"	10, '80.	24.00@25.00 fair price.
"	20, '80.	38.00 to 39.00	"	14, '80.	About 24.50.
"	24, '80.	37.00 and 38.00.	"	17, '80.	Bids of 26.00.
"	27, '80.	37.50 to 38.50.	"	21, '80.	Holders naming 26.50.
"	31, '80.	37.00 to 38.00.	"	24, '80.	It is doubtful if less than 26.00 would be accepted; as a rule holders ask 28.00.
April	3, '80.	About 37.00 and 38.00.	"	28, '80.	About 27.00; heard of 100 tons at 28.00 ex store.
"	7, '80.	About 35.50 'to 36.00 would be readily accepted.	"	31, '80.	27.00 and 27.50.
"	10, '80.	Not over 35.00; cable late this afternoon 105½ shillings.	Aug.	4, '80.	28.00@29.00.
"	14, '80.	34.00 to 35.00.	"	11, '80.	About 27.00.
"	21, '80.	34.00 and 35.00 spot.	"	18, '80.	About 27.50@28.00.
"	24, '80.	3,000 tons sold at 32.00 and 33.00; lot of 250 tons at 30.00 to arrive.	"	28, '80.	About 27.00.
"	28, '80.	About 30.00; holders' views are 1.00@2.00 over that; we learned of 2,500 tons sold 29 to 30 here.	Sept.	1, '80.	About 27.00; holders' views about 1.00 more.
May	1, '80.	28.50@29.00; 1,800 tons at 28.00@29.00 here.	"	4, '80.	Stock offered about 27.00.
"	19, '80.	25.00@26.00 to be full outside quotations.	"	8, '80.	About 300 tons at 27.00, de'd Phil.
"	22, '80.	25.00@26.00.	"	11, '80.	Some lots at 26.00, but more generally asked.
"	26, '80.	27.00 to 28.00 bottom figures; we hear of 4,000 tons at 26.00 in store.	"	15, '80.	26.00@27.00.
			"	18, '80.	About 26.00.
			"	25, '80.	27.00 full outside quotation.
			"	29, '80.	There are buyers at 26.00 at auction; 2,669 tons sold at 26.25, taken by Cleveland Roll. Mill.
			Oct.	2, '80.	\$26 to 26.50; 1,000 tons sold at \$25.75.

NELSON v. GRAFF and others.

(Circuit Court, W. D. Michigan, S. D. May 29, 1882.)

1. CONVERSION—TIMBER SEVERED FROM REALTY—RIGHT OF ACTION.

A party may maintain an action for a chattel which has become such by a wrongful severance from the realty; and the fact that the owner of the realty has contracted to sell it, and that the severance of the trees was by the vendee, and that vendee held possession as licensee, licensed to cut and remove standing timber on certain conditions, does not defeat the right of action by the vendor.

2. SAME—VALUE ENHANCED—RIGHTS OF OWNER.

The fact that the trees, after being severed, have been manufactured into shingles, and the value considerably enhanced, does not prevent the owner from having the chattel returned to him in its altered form.

3. SAME—VENDEE IN POSSESSION—As LICENSEE.

A vendee in possession of land under a contract of purchase is a tenant at will after default in payment. So, where a party obtained possession of land under a contract of purchase with the license to cut timber on each 40 acres as often as he paid a stipulated proportion of the purchase price, and he made default in the payment of an instalment, the cutting of timber would be a wrongful conversion, and he could not give a purchaser thereof lawful possession of the timber.

Replevin.

Taggart, Stone & Earle, for plaintiff.

Simonds, Fletcher & Wolf, for defendants.

WITHEY, D. J. The testimony discloses that Nelson was owner of 160 acres of pine land, which in January, 1878, he agreed to sell by written contract to one Chandler for \$4,800. Chandler paid at the time \$1,200, and agreed to pay a like sum by November 16, 1878, June 16, 1879, and January 16, 1880, with interest. The vendor stipulated that Chandler should have possession of the premises, but it was stated that he should not cut or dispose of any timber standing on the land except as provided in the contract of sale. The provision governing timber-cutting was in the following words:

"And he is hereby granted the privilege of cutting, manufacturing, and disposing of timber upon 40 acres of said land, and no more, until the second payment of \$1,200 and interest shall have been made, when the second party shall have the privilege of cutting and removing the timber from 40 acres more of the said land, and no more. And when the next payment of \$1,200 and interest shall be paid, the party of the second part shall have the privilege of cutting and removing timber from 40 acres more, and no more."

The payment down entitled Chandler to cut and remove the timber from 40 acres; he made a second payment of \$1,200, and was entitled to cut and remove the timber from another 40 acres. His pay-

ments then ceased, but he cut and removed the timber on 35 other acres, and sold the same to defendants, who manufactured the logs into shingles, being the property seized and replevied in this action by Nelson. There are 870,000 star shingles of the value of \$2.15 per 1,000, and 30,000 second shingles of the value of \$1.10 per 1,000, aggregating \$1,903.50. The shingles were seized under the writ of replevin July 24, 1879.

The legal title to the land was in Nelson and the timber was part of the realty. Under the contract to Chandler he acquired an equitable estate or interest in the land, and possession of it, with a restricted license to cut and remove timber. It is quite clear that the timber was wrongfully severed and converted by the vendee, for it was done, not under the license, but was a positive and plain violation of the terms of the license.

Upon principle and the authority of many judgments, it is manifest that one can maintain, on the strength of his title to realty, an action for a chattel which has become such by a wrongful severance from the premises; and the reason is because it belongs to the owner of the land. There are modifications that would affect such person's right to sue, but none of them affect this case. See *Kircher v. Schalk*, 39 N. J. Law R. 335, and cases there cited.

The fact that the owner of the realty has contracted to sell it, and the fact that the severance of the trees was by the vendee, does not, it is believed, interfere with the owner's right of action; nor does the fact that the vendee held possession as a licensee, licensed to cut and remove standing timber from 40 acres and no more, so often as he paid \$1,200, defeat replevin by the vendor.

A vendee who should have paid the contract price of the land would occupy a more favorable footing. The vendor in such circumstances would have the mere naked legal title without equities or other rights. He would be a trustee merely.

If Chandler could have maintained replevin against a trespasser who should have severed and converted the timber, it does not follow that Nelson could not have replevied from such trespasser by virtue of his title to the timber. It is a familiar rule that one in the rightful possession of a chattel can maintain suit against any one wrongfully depriving him of it, though he may not be the owner. A bailee may do this, and so may the bailor, if the chattel owned by him has been converted.

This is the case of a plaintiff asserting his right to a chattel based on his right as owner of the land from which the chattel has been

severed wrongfully. The fact that the trees after being severed have been manufactured into shingles and the value considerably enhanced does not prevent the owner from having the chattel returned to him in its altered form. Again, the fact that the defendants obtained the timber by purchase is not sufficient to defeat its recapture from them under the facts in this case. Defendants were put upon inquiry as to Chandler's rights. The records of the county disclosed title to the realty in Nelson. Defendants were bound to take notice of this fact. They knew where Chandler cut the timber, and inquiries of the proper party would have insured them, in all probability, the knowledge that Chandler had no right to any timber at that time.

Counsel for plaintiff cited Cooley, Torts, 55; Addison, Torts, 410; 21 Wall. 302; 9 Wall. 293; 21 Barb. 199.

Defendants' counsel cited, among others, 84 Mich. 138; 39 Wis. 515; 40 Mich. 286; 39 N. J. Law, 355.

"If trees growing on land demised to a tenant are cut by the latter, or fixtures attached to a dwelling-house are severed by the tenant, the landlord has an immediate right of possession of the trees and fixtures so severed from the inheritance. They are his goods and chattels, and, if they are taken away from the demised premises, he may maintain an action for the conversion of them." 1 Addison, Torts, 453; *Farrant v. Thompson*, 5 Barn. & Ald. 828. The wrongful cutting of timber, without carrying it away, is a conversion. 8 Barr, 294.

It has been held in this state that a vendee in possession of land under a contract of purchase is a tenant at will after default in payment. The contract in this case stipulates to that effect. See *Crane v. O'Reiley*, 8 Mich. 312. If the property had come lawfully into the possession of defendants, a demand and refusal would have been necessary before replevying. Here the conversion was wrongful by Chandler, and he could not give defendants lawful possession of the timber.

Plaintiff is entitled to judgment for six cents damages, and that defendants did unlawfully detain, etc., and costs of suit, and it will be entered accordingly.

See *The Timber Cases*, 11 FED. REP. 81; *United States v. Smith*, Id. 487 493; *United States v. Mills*, 9 FED. REP. 684.

PALMER v. DENVER & RIO GRANDE RY. Co.

Circuit Court, D. Colorado. May 12, 1882.

DAMAGES—DEFECTIVE CABOOSE—INJURIES—ACTION BY EMPLOYEE.

In an action for damages for personal injury sustained by a railroad employe, caused by a defective construction of employer's caboose, where it was shown that the car was dangerous and liable to accident at all times, and that the company had knowledge of that fact, the plaintiff has a right of action.

Ruling on Demurrer.

W. W. Cover and *T. A. Green*, for plaintiff.

E. O. Wolcott, for defendant.

HALLETT, D. J. In this case there has been a good deal of discussion as to the sufficiency of the complaint. As it now stands it is an action for injuries received by the plaintiff on account of the defective construction, as he alleges, of a caboose car attached to a freight train. The plaintiff was a brakeman in the service of the company, engaged in operating a freight train, and this car left the track, which gave him such alarm that he sprung from it, and received some injury to his shoulder by coming in contact with the earth.

He avers that the car in which he was riding was not properly constructed; that it had but four wheels, and these were attached to the car so firmly that there was no room for the wheels to accommodate themselves to the curves of the road; that whenever they came to a curve the car was likely to leave the track, as it did on this occasion. He avers that when the road was first opened, when the company first began to operate the road, many of the caboose cars were constructed in this way, but that they had been withdrawn, nearly all of them—he does not say how many remained in use—that nearly all of them had been withdrawn by the company, and others put in their place, of the ordinary pattern, which were adapted to the service; that he himself had no knowledge of the defect in the car; it was so constructed as not to attract his attention, and he went upon it without suspicion of danger in respect to its adaptability to the service, and that it would not keep the track.

Assuming the facts to be as stated, I have no doubt as to the right of action in the plaintiff. Of course we understand that employes in the service of a railroad company accept the ordinary hazards; such perils as are incident to the service. But it is also a rule that the company is bound to have safe and suitable machinery in operating their road, so as not to expose the people in their service to unneces-

sary dangers, such as may be avoided by reasonable care in the construction of their cars and other apparatus upon the road.

At first I supposed that it was beyond question that the plaintiff must have been ignorant of the defect in the car in order to recover in the action. That is averred in this complaint, that he was ignorant. After reading a great many cases I have some doubt now upon that proposition.

It is a question in my mind whether such a defect as this—it being averred, or the facts being shown from which it would appear that the company, having knowledge of the dangerous character of the car, and the circumstance that some of the cars had been withdrawn from use, which may be said to afford some reasonable ground for belief on the part of the employes of the company that it was the intention of the company to withdraw all of them from use very soon, and in that way amounting almost to a promise that they would be withdrawn—whether he might not recover even if it should appear that the character of the car was known to him. But that is not presented in this demurrer. The averment here is that the defect was not known to him; that the cars generally in use upon the road were of a proper construction, and that this was a dangerous car, and which was liable to accident at all times. The company having knowledge of that fact, continuing to use it, it would seem that the right of action is clear.

The demurrer will be overruled.

BERNEY, Ex'x, etc., v. DREXEL and others.

(*Circuit Court, S. D. New York. June 10, 1882.*)

1. ESTATES OF DECEASED—ANCILLARY LETTERS.

Under the general averment that letters testamentary were issued to the plaintiff, plaintiff's right to maintain the action in her representative capacity may rest upon the grant of ancillary letters, the statute authorizing the letters to issue to the person named in the foreign letters, and the validity of her appointment cannot be assailed on the ground that she is an alien.

2. SAME—JURISDICTION OF SURROGATE.

The decision of the surrogate as to the competency of a person to serve, to whom letters testamentary were issued, cannot be collaterally attacked.

Lord, Day & Lord, for plaintiff.

Tracy, Olmstead & Tracy, for defendants.

WALLACE, C. J. The demurrer to the complaint is not well taken. The averment that letters testamentary upon the will of the testator were duly issued to the plaintiff by the surrogate of the county of New York, under and by virtue of certain proceedings provided by statute, is a substantial compliance with section 532 of the Code of Civil Procedure, which dispenses with all averments of the jurisdictional facts requisite to the judicial determination of a court or officer of special jurisdiction.

Under this averment the plaintiff's right to maintain the action in her representative capacity may rest upon the grant of ancillary letters. The validity of her appointment cannot be assailed here on the ground that she was an alien when appointed. The statute authorizes the letters to issue to the person named in the foreign letters. Code, § 2607. Indeed, in the absence of any adjudication by the state courts upon the question, I should hold that prior to the enactment of the section referred to, and under the statute of 1863, (chapter 403,) the incompetency of an alien to serve as an executor did not attach when the appointment was under ancillary letters. But if it be conceded that an alien is not competent to serve as an executor, and the disability extends to the appointment under ancillary letters of the person named in the foreign will, the validity of the appointment cannot be assailed collaterally. Conceding, for present purposes, that the surrogate granted letters to an incompetent person, his determination was an erroneous but not a void exercise of judicial power. He had jurisdiction; his determination was not extrajudicial, but was within the limits of his jurisdiction; it involved the decision of a question of fact which he was the only authority, primarily, to solve. Suppose the surrogate had decided that the person appointed was not an alien, and therefore the objections to the appointment on that ground should not be sustained, would it be contended that the decision could be attacked collaterally? Under the statutes the surrogate had the power to hear and determine whether the plaintiff was competent to act as executrix. He therefore had jurisdiction over the subject-matter. He decided that she was competent, and that decision is conclusive until reversed. A wrong decision does not impair the power to decide on the validity of the decision when questioned collaterally. It is not necessary to cite authorities for these familiar principles, but the case of *Canjolle v. Ferrie*, 13 Wall. 465, is quite in point. There the surrogate was required by the statute to grant letters to the relatives of the deceased, who would be entitled to succeed to his personal estate, and

it was held that his decision was conclusive when sought to be attacked collaterally by showing that the letters were not issued to such relatives.

Inasmuch as, under the allegations of the complaint, the authority of the executors of Berney's will depends upon the law of France, and it must be assumed from the averments that they had no power to dispose of the bonds in suit, it is not necessary to discuss the effect of a sale under a power of attorney from the executors according to the law of this country.

The demurrer is overruled. Defendants may answer within 20 days on payment of costs of demurrer.

FRELINGHUYSEN, Receiver, etc., v. BALDWIN and others.

(District Court, D. New Jersey. June 3, 1882.)

JURISDICTION—RECEIVERS AS OFFICERS OF UNITED STATES.

A receiver of a national bank is an officer of the United States, and as such may sue in the federal courts in the district in which such bank is located.

Demurrer to Plea.

A. Q. Keasbey, U. S. Dist. Atty., for receiver.

Courtlandt & R. Wayne Parker, for defendants.

NIXON, D. J. This case arises upon demurrer to a plea. Frederick Frelinghuysen, the receiver of the Mechanics' National Bank of Newark, has brought suit against Oscar L. Baldwin, the late cashier, and his sureties upon their bond to the corporation conditioned for the faithful discharge of his duties as cashier. The plea demurred to avers that all the parties to the bond are citizens of the state of New Jersey, and that the court has no jurisdiction in such a case. By the provisions of the national banking act the comptroller of the currency is authorized, with the concurrence of the secretary of the treasury, under certain circumstances not necessary to be here stated, to appoint a receiver to wind up the affairs of the association. Section 5191 of the Revised Statutes. Such receiver, after giving the bond and security required by the comptroller, takes possession of the books, records, and assets of every description of the association; collects all debts, dues, and claims belonging to it; and under the direction of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and dispose of all the real and personal

property; and, when necessary to pay the debts of the association, may enforce the individual liability of the stockholders. His duties are to convert all the assets into money and to pay the same to the treasurer of the United States, subject to the order of the comptroller, and to make report to that officer of all his proceedings. Section 5234. He is thus the agent of the United States for the performance of specified duties, and by section 380 of the Revised Statutes all his suits should be conducted by the district attorney of the United States for the district in which they are pending.

The discharge of these duties necessarily implies the right of appealing to some court for aid; and the question raised by the demurrer is whether he may go in his own name into the district or circuit court of the United States for the collection of the debts or claims of the association. The fourth subdivision of section 563 of the Revised Statutes confers upon the district courts jurisdiction of all suits at common law brought by the United States, or by any officer thereof authorized by a law of congress to sue. This is a substantial re-enactment of the fourth section of the act of March 3, 1815. The present suit is one at common law, instituted by a receiver, who is authorized by law to sue. He is clearly within the statute, if he is, in any proper sense, an officer of the government. Receivers are always regarded as officers of some sort. When appointed by a court they are the officers of the court. When appointed by lawful authority to do the work which congress charged the government to perform, why should they not be considered officers of the government? The second subdivision of the second section of the second article of the constitution of the United States has reference to the appointment of officers of the United States, and the last clause authorizes congress by law to vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments. The secretary of the treasury is the head of the treasury department. Section 233. By section 324 the comptroller of the currency is the chief officer of a bureau of the treasury department, charged with the execution of all laws passed by congress relating to the issue and regulation of a national currency, secured by United States bonds. This officer, in cases of the insolvency of the association, appoints a receiver, through whose instrumentality the assets are turned into the treasury of the United States; but the comptroller performs this, as well as all other duties, under the general direction of the secretary of the treasury.

It is difficult to perceive on principle why appointments thus made are not appointments by the head of a department of the government, and why persons thus designated and charged with the performance of such duties should not be regarded as officers of the United States. The decisions of the supreme court, under analogous statutes, passed years before the one under consideration was enacted, afford us material aid in determining the question.

By the twenty-first section of the act of March 2, 1799, (section 2621 of the Revised Statutes,) the collectors of customs are authorized, with the approbation of the secretary of the treasury, to employ proper persons as "weighers, gaugers, measurers, and inspectors," and the courts have uniformly held that the congress, by such an enactment, was exercising its constitutional power of vesting by law in the head of a department the appointment of officers of the government. *U. S. v. Sears*, 1 Gall. 221; *U. S. v. Bachelder*, 2 Gall. 15; *Sanford v. Boyd*, 2 Cranch, C. C. 78; *U. S. v. Barton*, Gilp. 439. Again, by the sub-treasury act of August 6, 1846, congress empowered the president to nominate and appoint four assistant treasurers of the United States, one of whom was to be located at the city of Boston, in the state of Massachusetts. By the general appropriation act of July 23, 1866, such assistant treasurer was authorized to appoint, with the approbation of the secretary of the treasury, certain clerks in the office for the safe-keeping, transferring, and disbursing the public moneys. It was held by the supreme court in *U. S. v. Hartwell*, 6 Wall. 385, that such clerks were officers of the United States, and were subject to all the penalties prescribed by the law against officers for the loaning to third persons any portion of the public moneys entrusted to them for safe-keeping. But in the present case we are not left to the analogies of other acts. It has been expressly decided, in every instance where the question has been raised and discussed, that receivers appointed under the national banking act are officers of the government, and as such are entitled under the specific provisions of law to sue. Thus in *Platt v. Beach*, 2 Ben. 303, after full argument and due deliberation, Judge Benedict, of the eastern district of New York, came to the conclusion that the receiver was an officer of the United States, and hence was competent to maintain actions at common law in the federal courts for the collection of claims due to the association at the date of his appointment. He has been followed by Judge Blatchford, in the southern district, in the case of *Stanton v. Wilkeson*, 8 Ben. 357.

In *Kennedy v. Gibson*, 8 Wall. 498, the plaintiff resided in New York, and was the receiver of the Merchants' National Bank of

Washington, and brought his suit against certain stockholders in the circuit court of the United States for the district of Maryland. It is conceded that the case turned upon other matters, and that the question involved here was not necessarily before the court in that case. But Mr. Justice Swayne, speaking for the whole court, in the conclusion of the opinion says:

"The fifty-ninth section directs that 'all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury.' Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, *without reference to the locality of their personal citizenship.*"

Two years afterwards the late Justice Clifford, in delivering the opinion of the same court in the *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 401, took occasion, as it would seem unnecessarily, to go out of his way to allude to and reiterate the correctness of the rule thus stated.

The demurrer to the plea is sustained, with costs. The defendants have leave to plead within twenty days.

CHICAGO THEOLOGICAL SEMINARY v. GAGE.

(Circuit Court, N. D. Illinois. May 15, 1882.)

1. TAXES—ENFORCEMENT OF PAYMENT—OBJECTIONS TO VALIDITY.

The proceeding to enforce the payment of taxes by a sale of the lots is, in a certain sense, a proceeding *in rem* against the property, but the owner has a right to be heard at the time the judgment is asked for; but if he fails to appear and make known his objections, he is concluded by the judgment.

2. SAME—JUDGMENT—COLLATERAL ATTACK.

When a tax-payer has been cited, and has had his day in court to say why judgment should not be rendered against his land, he cannot afterwards attack the judgment collaterally.

David Fales, for complainant.

A. N. Gage, for defendant.

BLDGETT, D. J. This bill was filed on the twenty-second day of April, 1880, to set aside a tax sale as a cloud upon complainant's title. The bill alleges that complainant is owner in fee of certain lots in this city, described in the bill; that in 1874 state, county,

and other taxes, to the amount of \$56, were assessed on the lots in question, and on the twenty-fourth of September, 1875, at a tax sale by the treasurer of Cook county, the lots were forfeited to the state for the amount of taxes and costs; that in the year 1875 state, county, city, and other taxes were assessed on the lots to the amount of \$117.19; that a large proportion of such levy was illegal, being for items of expenditure by the city of Chicago, for the payment of which the city had no right to appropriate money and levy taxes for the payment of the same; and that the amount of taxes for which the lots were forfeited to the state in 1875 was also extended against them in 1875, with the taxes of the latter year, and that at the tax sale for 1876 the lots were again forfeited to the state; that in 1876 the lots were assessed for the taxes of that year, and the taxes of 1874 and 1875, for which the lots had been forfeited the preceding year, were added to the levy of the latter year; that judgment was entered against the lots for the taxes of 1876, and the back taxes of 1874 and 1875, and on the twentieth of September, 1877, the lots were sold for such taxes and costs, which amounted to \$442.61, and defendant Asahel Gage became the purchaser; that the time for redemption had expired, but the purchaser had taken out no deed, but was threatening to do so.

No irregularity or illegality is charged in the levy of such taxes, and the judgments and sales, except that certain of the city taxes were illegally levied; that is, that the city appropriation bill and tax levy contained certain items, making about 13 per cent. of the entire levy for the year 1875, which the city had no right to collect by taxation. Wherefore, complainant claims that the sale is wholly void, and prays to have the same set aside as a cloud upon its title.

To this bill defendant Asahel Gage has filed a plea setting out the levy of the taxes by the proper authorities of the county, city, and town for the years 1874 and 1875; the non-payment thereof; the application for judgment and rendition of judgment in each year, and forfeiture of the lots to the state for want of bidders at the first two tax sales; the levy of the taxes of 1876 and the addition thereto of the amounts for which the lots had been forfeited the preceding years; the non-payment of these taxes; the return of the lots as delinquent for the taxes of 1876; the publication of notice and other steps required for the purpose of making the tax sale; the rendition of judgment, and the sale in pursuance of such judgment, and the purchase of the lots by the defendant for the amount of taxes, interest, and costs adjudged against the lots, and submits that complainant is barred by such judgment from alleging the illegality of a part

of such taxes as a reason for avoiding and setting aside his purchases. The sufficiency of this plea as an answer to complainant's bill is the only question now raised.

A careful examination of the plea shows a full compliance, so far as I am able to note, with all the prerequisites to make a valid tax sale. No appearance was made by the owner of the lots, or any one in his behalf, at the time of the application for judgment, and no objections to the entry of judgment were made. So far as these lots are concerned, judgment, as shown by the plea, was rendered by default, no cause against judgment being shown; but complainant insists that as the supreme court of this state, on appeal, in a case where the owner of lots appeared before the county court on application for judgment and resisted the same by reason of the illegality of certain portions of the levy, decided such tax to be illegal and the whole levy vitiated thereby, therefore these items can now be attacked collaterally and the sale declared void by reason of the illegality of a portion of the tax.

There is no dispute but what a very large proportion of these taxes was lawfully levied and a charge upon this property. The law provides for a hearing as to the validity of taxes at the time the judgment is asked for. The proceeding to enforce the payment of taxes by a sale of the lots is, in a certain sense, a proceeding *in rem* against the property; but the owner has a right to be heard, and if he has any reason to urge against the validity of the tax, or any part of it, it is his duty to make it known then. He has his day in court at that time; and, if he fails to appear and make known his objections, it seems to me, upon every principle of judicial action, he must be concluded and barred by the judgment. After the judgment has been rendered, and the property sold in pursuance thereof, the owner ought not, it seems to me, to be allowed to go behind the judgment and dissect the tax; and if he can find an illegal item of expenditure, for which the municipality has made an appropriation, which has been included in the levy, to have the whole assessment and the proceedings of judgment and sale declared void.

Counsel for complainant relies upon *Belleville Nail Co. v. People*, 98 Ill. 399, in which it is said that the "judgment of county court for taxes is not conclusive upon the owner of the liability of the land for taxes assessed on it." In the light of the later cases of *Gage v. Busse* and *Gage v. Parker*, decided by the same court at its recent term, I do not think that the force should be given to the expression which I have quoted from the opinion above which is claimed by the learned

counsel for the complainant. It must be noted in the first place this case of the *Belleville Nail Co. v. People* was where an application was made for judgment, and not a case like this, where the judgment is attacked collaterally. There the owner of the property appeared on the application for judgment and resisted the entry of judgment on the ground of the illegality of the tax, claiming that it, being a personal tax, was not a lien on the real estate which had changed hands; and the expression used in the opinion as to the binding character of a judgment of this kind upon the owner of the property it seems to me is only *obiter*, as it was not necessary for the court to use any such expression in deciding the case as it did. That case was where the owner of the property had appeared and was then resisting the entry of judgment; but here the complainant kept still and allowed judgment to be rendered against the property, allowed the sale to take place and redemption to go by; and now, on the ground that some years before a few items had crept into the appropriation bills of the city which the city had no right to levy a tax for, seeks to go behind the judgment and set aside the tax sale as wholly void. The supreme court, in the later case of *Gage v. Parker*, not reported, has almost in express terms, without referring to the *Belleville Nail Co. Case*, overruled the principle asserted in that case, where there is no appearance on application for judgment. It seems to me that when the tax-payer has been cited into court in the manner required by the statute, and has had his day in court to say why judgment should not be rendered against his land, he should not afterwards be heard to attack the judgment collaterally.

This court should, it seems to me, give full force to the judgment of this county court, clothed as that court was with full power to hear and determine every question touching the validity of those taxes.

Every citizen and land-owner knows that his property is subject to the burdens of the government, and is assessed at certain times and under stated forms of proceeding, and if he wishes to resist such charges on the ground of illegal assessment, or for any other reason, he should do it when the court is open to hear him; and if he neglects to appear and show cause against the judgment, and judgment is rendered against the property, I think it must be held conclusive.

I therefore think this plea sufficiently answers the charges of this bill, and an order will be entered to that effect.

UNITED STATES *v.* THREE THOUSAND EIGHT HUNDRED AND EIGHTY BOXES, etc.*(District Court, D. California. June 2, 1882.)*

CUSTOMS DUTIES—SMUGGLING—CONDEMNATION OF PROPERTY SEIZED.

Where a quantity of opium was seized by officers, the burden of proof is on the claimant to show that the property seized was of domestic manufacture and not liable for customs duties; and if he fails to explain the difficulties of the case by the production of proofs within his power to produce, "condemnation follows from the defects of testimony on the part of such claimant." And where the claimant has it in his power to produce the best and most satisfactory evidence to repel the presumption which the law has raised against him, and he omits to do so and contents himself with the weaker evidence, the presumption is "turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence."

A. P. Van Duzer, Asst. U. S. Atty., on behalf of the United States.
Geo. W. Towle, Jr., for claimants. *W. H. L. Barnes*, of counsel.

HOFFMAN, D. J. On the night of the third of January, between 12 and 1 o'clock, as officers Egan and Smith, of the harbor police, were on duty patrolling the bay along the city front, their attention was attracted to a boat, which, when first discovered, was at a short distance from the stern of the steamer City of Tokio, then recently arrived from China. They at first supposed it to be the custom-house lookout boat, but observing that she had pulled out from the stern of the steamer their suspicions were aroused, and they gave chase. The boat they were pursuing seemed desirous of escaping, but as she was heavily laden, and was rowed by only one pair of sculls, while their own boat was light and rowed by both officers, she was soon overhauled. When they had approached within a short distance of the boat the officers hailed her and ordered her to stop. Whether the order was obeyed they are unable to state, as the boat's oars were muffled. On coming along-side the boat the officers inquired of the men in charge of her what they had on board. The reply was that they did not know. One of the officers then put out his hand and felt one of the packages. He at once recognized by the sound that it was a tin case, and concluded that the package contained opium. The men were then placed under arrest and handcuffed. They were much excited, and repeatedly begged the officers to take the stuff and let them go. The officers refused to listen to their entreaties, and the boat was taken to the Folsom-street wharf, in tow of the patrol boat, when the men were landed, and by officer Smith conducted to the nearest police station.

Officer Egan remained in charge of the boat and its contents, and while awaiting officer Smith's return he observed a man looking around as if trying to discover where the boat was. After the return of officer Smith, and while the opium was being landed on the wharf, both officers approached the man who had been observed on the look-out. He declined to speak with them both, saying, "One at a time; I want to do business with one at a time." Officer Smith then withdrew, and the man, who gave his name as Kennedy, offered Mr. Egan at first \$2,000 and subsequently \$10,000 if he would let the arrested men go; telling him he might "keep the stuff," that he did not want to be exposed, etc. This proposal was rejected by the officer. Substantially the same propositions were made to officers Smith and Metzler, the latter of whom had come from the police station to assist in unloading the boat. To each of these officers he claimed to be interested in or to be the owner of the boat and her cargo. He said his name was Kennedy. One of the parties arrested, and who has since been indicted, is named Kennedy, and is the claimant in the present suit. On the crew list of the steamer City of Tokio appears the name of Kennedy as steerage steward. There are said to be three brothers of that name.

I have omitted to mention that to one of the officers the Kennedy who appeared on the wharf stated that he was regularly engaged in the smuggling business, and that if the officer would discharge the prisoners he would put him "in the way of making many a dollar;" and to another, when proposing that he should keep "the stuff," he offered to show him where he could sell it. The admission of this testimony was strenuously objected to on behalf of the claimant, unless it should be shown *aliunde* that Kennedy was connected with the goods or with the claimant. I think it clearly admissible as part of the *res gestæ* or circumstances attending the seizure. The inquiry here is not as to the guilt or innocence of persons accused of smuggling, but as to the guilty or innocent character of the goods seized. Any circumstance tending to show that they were illicit or smuggled goods can be proved with a view of impressing on them a guilty character. Nor can any proper narrative of the seizure be given if any material circumstance attending it be omitted.

Some time after midnight, on a boisterous and stormy night, a deeply-laden boat, with muffled oars, is discovered in the immediate vicinity of a recently-arrived China steamer. When overhauled the men in charge profess ignorance of her lading. She is found to be laden with 100 packages, each containing 40 five-tael boxes of opium,

the value of which was in the neighborhood of \$20,000. On being arrested the men in charge made repeated offers to surrender this valuable property as the price of their liberation; and a short time after, when the boat has reached the wharf and before the contents are unladen, a person who had apparently been on the watch approaches the officers with offers of large bribes, claims to be the owner of or interested in the goods, and avows himself engaged in the smuggling business. Certainly no one of these circumstances should be withheld from the knowledge or withdrawn from the consideration of any one seriously inquiring into the true character of the goods in question. *U. S. v. Nine Trunks*, 6 Rep. (N. S.) 613.

On the morning after the seizure the packages were taken to the United States appraiser's building and delivered to the custom-house authorities. They consisted of 194 tin cases, each containing 20 five-tael boxes of opium. These tin cases and the boxes containing the opium in external appearance exactly resembled the cases and boxes in which opium is imported from China. So close was this resemblance as to brands, stamps, labels, etc., and the size and shape of the packages, that it was impossible to distinguish, by any external signs, the seized opium from the imported article.

In further proof that the goods under seizure were foreign imported opium the prosecution called a Chinese witness, who professed to be an expert, and testified that he had been employed at Hong Kong in the manufacture of opium. A sample of the opium seized was presented to him. After testing it in the presence of the court, by burning and smoking, he pronounced it to be of Hong Kong manufacture.

It was also shown on the part of the United States that by the regulations of the custom-house a duty-paid stamp is attached to all packages of foreign opium which have been regularly imported and entered. No such stamps were found on the packages under seizure. It is unnecessary to dwell on this circumstance, for it is not pretended that duties have been paid on the goods on trial. The defence, when subsequently developed, was based on the contention that they were of domestic manufacture and not subject to duty. On these proofs the court was of opinion that not only had a clear case of probable cause of seizure been made out by the government, but that a very strong *prima facie* case for condemnation had been shown, and that the *onus probandi* was on the claimant.

Before proceeding to examine the proofs offered by the claimant, what constitutes probable cause, and what is the nature of the "bur-

den of proof" which the law casts upon him, must first be considered.

Section 909 of the Revised Statutes of the United States is as follows:

"In suits or informations brought when any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person the burden of proof shall be upon such claimant: provided, that *probable cause* is shown for such prosecution, to be judged of by the court."

This provision, which was originally adopted in 1799, has been frequently applied and expounded by the courts. In *Locke v. U. S.* 7 Cranch, 339, Marshall, C. J., observes:

"It is contended that probable cause means *prima facie* evidence, or, in other words, such evidence, as in the absence of exculpatory proof, would justify condemnation. This argument is very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. It implies a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

In the case of *John Griffin*, 15 Wall. 33, the supreme court says: "The case as thus made amounts to something more than the probable cause which, by section 71 of the act of 1799, throws the *onus probandi* on the claimant of the vessel. It is a clear *prima facie* case, and, both by the statute and the ordinary rules of evidence, required of the claimant such testimony as should *satisfactorily rebut* the presumption of guilt which it raised." These observations apply with equal force to the case at bar. There can, I think, be no doubt that a *prima facie* case for condemnation was made by the government, and that the *onus probandi* was thrown upon the claimant, and it became his duty "to satisfactorily rebut the presumption of guilt which it raised." This duty could only be discharged by the production of the best evidence of which the nature of the case admitted. In the case of *The Luminary*, 8 Wheat. 407, the supreme court says:

"When the *onus probandi* is thrown on the claimant in an instance or revenue cause by a *prima facie* case made out on the part of the prosecution, and the claimant fails to *explain the difficulties of the case* by the production of papers and other evidence which must be in his possession or under his control, *condemnation follows from the defects of testimony on the part of the claimant.*"

It will be noted that in the case at bar there were not merely "difficulties" to be "explained," but positive testimony that the goods were of Hong Kong manufacture, and that they had not passed through the custom-house. If so, they must necessarily have been smuggled; a conclusion strongly corroborated by all the circumstances attending the seizure.

In the case of *Clifton v. U. S.* 4 How. 247, the supreme court says:

"Under these circumstances the claimant was called upon by the strongest consideration, personal and legal, if innocent, to bring to the support of his defence the very best evidence that was in his possession or under his control. This evidence was certainly within his reach, and probably in his counting-room; namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it and contented himself with weaker evidence, but even refused to furnish it on the call of the government, leaving, therefore, the obvious presumption to be turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence.

"One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied to the distinction between the higher and inferior degree of proof, speaking in the more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is not that the courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted which, from the nature of the case, supposes still greater evidence behind in the parties' possession or power; because the absence of the primary evidence raises a presumption that if produced it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party. * * * For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence, especially when it appears or has been shown to be in his possession or power, and must and should in all cases exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled. It is well observed by Mr. Evans, (2 Evans' Pothier, 149,) in substance, that if the weaker and less satisfactory evidence is given and relied on, in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and that it may well be presumed if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

Guided by the principles thus clearly enunciated by the supreme court, I proceed to consider, as briefly as may be, the evidence offered by the claimant to repel the vehement presumption of guilt raised by the case made by the prosecution.

The first evidence on the part of the defence was the testimony tending to show that the opium in question was not, and could not have been, taken from the Tokio.

It seems that, from some grounds not explained, the custom-house authorities had been led to suspect that an attempt to smuggle opium from the Tokio was in contemplation. The force of night watchmen was therefore increased, and the necessity of vigilance strongly impressed upon at least some of them. All the watchmen on duty on the night in question, including both watches,—those on duty up to and after 12, midnight,—were examined. They denied having seen any goods taken from the ship. It may be conceded that so large a quantity of opium, exceeding in weight a ton, could not have been discharged from the steamer into a boat along-side without the complicity of the watchmen on board the vessel, or gross and almost inconceivable negligence on their part. These witnesses, therefore, appear on the stand to exonerate themselves by their own testimony from the imputations which the theory of the case advanced by the government casts upon them. They are not disinterested witnesses. I speak now of the watchmen on the deck of the steamer. The discharge of the opium, if it in fact occurred, might easily have escaped the notice of the watchmen posted on the wharf. In estimating the credibility of those who must have witnessed the transaction, if it took place, the circumstances under which they appear upon the stand are not to be lost sight of.

Both of the harbor police officers testify that when they had approached within a short distance of the Tokio they were hailed from the steamer. To the inquiry what boat that was, they replied, "Police boat." I see no reason whatever for discrediting their statement. They have proved their fidelity under circumstances which, to officers less honest, might have presented an irresistible temptation. It is a fact worthy of notice that all the night watch deny having heard these hails.

In rebuttal of the Chinese expert testimony offered by the government, the claimant produced other Chinese experts to show that the opium seized was manufactured in this city.

With a view of testing their skill or veracity the government produced from the bonded warehouse several boxes of opium proved to

have been recently imported from China. These, with other similar samples of the opium under seizure, were carefully wrapped up and submitted to the experts, under circumstances which seemed to preclude the possibility of their knowing from which of the two lots of opium the particular sample submitted to them was taken. They proceeded to test them by burning, inhaling, etc., in most instances subjecting the sample to several tests. In almost every instance they pronounced the seized opium to be San Francisco opium, and the custom-house opium to be Hong Kong opium. These experiments must, I think, in fairness be taken as establishing the fact that the witnesses were able to distinguish the seized from the custom-house opium by the tests they applied. But this is all they establish.

The further and vital fact that the seized opium was of San Francisco manufacture rests upon their declarations of their opinion. No proof was offered to show that only one kind or quality of opium is manufactured at Hong Kong. I presume I am at liberty to notice the generally-accepted commercial fact that opium prepared for smoking is largely manufactured in China, both from the India opium and from the native article.

The defence relied on, as has been already stated, was that the opium seized was manufactured in this city from imported crude opium. The suspicious circumstances attending the seizure are explained by the suggestion that the object of the midnight expedition of the boat with muffled oars, etc., was to clandestinely place the opium on board the steamer City of Sydney, then bound to Honolulu, with a view of smuggling it into that port, where, being a prohibited article, it commands a high price. If such be indeed the facts of the case, they afford, whatever may be thought of the morality of the enterprise, a valid defence to this prosecution, for no offence against the laws of the United States has been committed.

But the court, when such a defence is set up, has a right to exact that it should be satisfactorily made out by the production of the best proofs that the nature of the case will admit. The fraud relied on as a defence was not only a fraud upon the laws of a friendly foreign power, but a fraud upon the American owners of the City of Sydney, who were to be not merely cheated of their freight, but exposed to confiscation or severe penalties if the proposed smuggling adventure should be detected by the Hawaiian authorities.

In support of this defence a witness was called who testified that he was a water-tender on board the City of Sidney, and that he was employed to secure and secrete on board of this steamer a boat-load of

opium on the night of the seizure. His story was not unaccompanied by improbabilities; but as he stated that the engagement was made with him alone, and that he alone was on the watch to receive the opium, the statement could not readily be disproved. It received no corroboration from the claimant, who forbore to offer himself as a witness.

But, assuming it to be true, it bears but remotely and indirectly upon the vital issue in the case. It may be true that the claimant proposed to smuggle this opium into Honolulu, and it may also be true that he had previously smuggled it into this port.

In further support of the defence set up, a drayman, named Sheridan, testified with great minuteness of detail to having hauled, by order of the claimant, on the evening of the seizure, two drayloads of goods to a wharf on the city front, where they were transferred to a boat in waiting to receive them. These goods, the drayman stated, he received at a store in the Chinese quarter from a Chinaman whom he pointed out in court. The testimony of this witness was wholly uncorroborated, notwithstanding that corroboration was easy if the story was true. Neither the claimant nor the boatman, nor the Chinaman from whom the opium was said to have been obtained, was called to the stand.

To rebut this testimony the United States produced three witnesses who testified that Sheridan spent the whole of the evening in question in their company at the Theatre Comique, a free-concert saloon in this city. The credibility of these witnesses was vehemently assailed by the counsel for the claimant. No formal attempt to impeach them, however, was made. From their cross-examination it appeared that they were young men of respectable families, but probably somewhat addicted, as unfortunately is too common in this city, to idleness, and perhaps dissipation. I see no reason for absolutely discarding their testimony. It must be accepted as at least casting a doubt upon the truth of Sheridan's statement, and as seriously impairing the strength of the case, which the claimant was bound to make out by satisfactory proofs.

A driver in the employment of Sheridan was also called by the prosecution. He testified that on the night in question he slept in the stable where Sheridan's horses and dray were kept, and that they were not taken out of the stable during the night. Upon this witness I place little reliance. He was unable to identify the night in question except by the fact that it was his habit to sleep in the stable. But it was shown by other testimony that his habits were very irregular,

and he disclosed unmistakable signs of personal hostility to Sheridan. The last and most perplexing circumstance connected with this case remains to be considered. The opium seized was packed in tin cases, each containing 20 five-tael boxes. In every one of the cases that was opened was found a fragment of a newspaper, published in this city, of a date so recent as to preclude the possibility of its having been sent to Hong Kong and there inserted in the cases when they were packed. These pieces of newspapers must therefore have been introduced into the cases after their arrival at this port, and as the lids or covers of the cases were found closely soldered, the operation would have required much time and very extensive complicity or extraordinary negligence on the part of the officers in charge of the vessel.

But, on the supposition that the opium was in fact manufactured in this city and packed here, with what object could these papers have been inserted in the cases? The suggestion was thrown out at the trial that it might have been to apprise the accomplices at Honolulu of the true character of the opium. But this could more easily have been done by letter or communicated orally by the claimant, who, it is said, was to accompany the goods to Honolulu. A more probable motive would seem to be, to furnish the apparent evidence of the domestic manufacture of the goods, which is now relied on in this case. If, then, the opium was of domestic manufacture, and the papers were inserted to furnish evidence of that fact in case of seizure, why was not the simpler and more effectual method resorted to of procuring from the custom-house authorities stamps which, by the regulations, may on the application of the manufacturer be attached to all packages of manufactured opium? But these stamps would, it is to be presumed, have been furnished only after an investigation and the verification of the true character of the goods, by ascertaining when and by whom they were manufactured, where the crude opium was obtained, and when and by what vessel imported. It may not unreasonably be suspected that the parties were not prepared to invite such an investigation, especially as in the trial of this case they have studiously withheld all information on these points, which, if established in their favor, would have furnished a complete and unanswerable defence to the prosecution. The foregoing presents, it is believed, a sufficiently complete statement of the proofs offered on the part of the claimant. It is evident that the case presents but a single issue of fact, viz.: Was the opium manufactured in this city or imported? The claimant contends that a

quantity of opium weighing more than a ton and of the value of nearly \$20,000 was manufactured in this city, purchased by him, and placed in a boat to be clandestinely laden on board the City of Sidney. The *onus probandi* was on him to establish these facts, and by the production of the best evidence the nature of the case admitted. He was himself a competent witness. He is not produced on the stand. The person from whom his drayman states he obtained the opium, though present in court, is not called as a witness. If so large a transaction in fact occurred, he could no doubt have corroborated the statements with regard to it by the production of his books and an account of the mode in which he was paid. He could have indicated the name of the manufacturer, and the latter could have shown the place of the manufacture, how and from whom he obtained the crude opium, and, possibly, when and by what vessel it was imported. If the facts be as contended by the claimant, the more searching the inquiry the more clearly would the truth have been made manifest. Evidence on these points, though within his reach, he has withheld. He has not even called the boatman to corroborate his drayman, though the latter was contradicted by three witnesses.

It was suggested at the bar that the claimant might be unwilling to appear on the stand where, on cross-examination, he might be compelled to make compromising disclosures with regard to his operations in the Sandwich islands and his confederates in that kingdom. But he and one of his employees are under indictment for a crime for which, if convicted, they may be sent to the state prison. A large amount of property is staked upon the result of the cause now on trial. If the facts be as he claims, his testimony in support of them would go far to secure the restoration of the goods and his exoneration from the charge for which he is indicted, while his silence has, under the decisions, a most damaging, if not fatal, effect upon his cause. It would seem that the inducements to him to testify, if the facts be as the defence claims, are far stronger than any motives for silence afforded by the fear of compromising his associates at Honolulu, or of breaking up his illicit but lucrative operations at that port.

My conclusion is that no plainer or stronger case could be presented for the application of the rules of decision laid down by the supreme court in the cases which have been cited, viz., that where the burden of proof is thrown upon the claimant, and he fails to explain the difficulties of the case by the production of proofs within his power to produce, "condemnation follows from the defects of testimony on the part of the claimant;" and, further, that where the claim-

ant has it in his power to produce the best and most satisfactory evidence to repel the presumption which the law has raised against him, and he omits to do so and contents himself with the weaker evidence, the presumption "is turned against him, the highest and best evidence, going to the reality and truth of the transaction, would not be favorable to the defence."

I do not deem it necessary to examine the proofs of other illicit operations in Hong Kong by the claimant, which seem to be afforded by his intercepted correspondence. I place the decision of the case on the grounds above indicated. A decree of condemnation must be entered.

UNITED STATES *v.* A LOT OF SILK UMBRELLAS.*

(Circuit Court, E. D. Louisiana. June, 1881.)

1. REVENUE—PENALTIES AND FORFEITURES—IMPORTS—REV. ST. § 2809.

To incur a forfeiture under section 2809 of the Revised Statutes, which relates to the importation of merchandise into the United States from abroad, there must be an intentional omission from the manifest.

2. COSTS—REASONABLE GROUND FOR SEIZURE—REV. ST. § 970.

Under section 970 of the Revised Statutes, the fact that the goods seized were not on the manifest shows that there was reasonable ground for seizure and claimant cannot recover costs.

A. H. Leonard, Dist. Att'y, for the United States.

Alfred Shaw, for claimant.

PARDEE, C. J. As shown by the evidence, the conduct of government officials seizing these libelled goods was not creditable, or calculated to further the true interests of the government or foster the commerce of the port. The conduct of the officials in the examining room, in destroying the labels and marks to prevent identity of the goods, was highly reprehensible. They should have been reported and discharged. The government is not the enemy of commerce nor of importers. The forfeiture of the goods seized is asked under the provisions of section 2809, Rev. St., for not being included in the manifest. This section provides for a fine or penalty on the master equal to the value of the merchandise not included in the manifest, and the forfeiture of all such goods belonging or consigned to the master, mate, officers, or crew of such vessel. The evidence in this case is to the effect that the goods were not included in the manifest; they were

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

not ship stores, nor were they described in the list of stores. The goods were not of the kind, (say the umbrellas, baskets, cloak, etc.,) or of the quantity, (say shirts and opodeldoc,) suitable for ship stores. The manifest shows no passengers. There was no such concealment as showed an intent to smuggle. The seizure was made the same day the manifest was sworn to, and the testimony of the captain and mate, and the conduct of both, are to the effect that the omission of the goods from the manifest was an oversight. All the goods except the umbrellas,—but one,—the opodeldoc, the shirts, and baskets, are proved to have belonged and been consigned to Henric R. Piccaluga, a merchant of this city not belonging to the vessel, and were family presents sent to him by his relatives in Genoa. These goods were under \$200 in value, and might have been admitted to entry upon appraisement without invoice. Treasury Reg. § 337.

The goods shown to have belonged to Piccaluga cannot be forfeited in this proceeding, as they are not covered by section 2809, Rev. St.

As to the remaining goods, the question to be decided is whether the omission punished by penalty and forfeiture under section 2809, Rev. St., must be an omission complete, with intent, or may be any bare omission, whether intentional or accidental. The statement of this question seems to suggest the answer.

Intent is necessary for any criminal or penal violation of a prohibitory law. It is a general rule, and unless there are adjudicated cases by the United States courts to the contrary under the revenue laws of the United States I shall so hold in this case. My attention has been called to no such cases, and I know of none. In the case of *U. S. v. 84 Boxes of Sugar*, where the sugar was labelled because entered for payment of duties under a false denomination, with a view to defraud the revenue, Judge McLean, organ of the supreme court, says: "The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred." 7 Pet. 463.

The principle will apply to this case, although no direct element of fraud is charged.

To be perfectly clear, what I hold is that to incur forfeiture under section 2809, Rev. St., there must be an intentional omission from the manifest.

Of course, in cases under that section the usual rule would govern, so far as making a case for the government is concerned. The gov-

ernment shows the act, and from the act and its circumstances the intent is inferred, until negated by claimants' evidence.

The goods seized in this case not being on the manifest, and notwithstanding the criticisms made on the mode of seizure, I am of the opinion there was reasonable ground for seizure. See section 970, Rev. St.

A judgment will, therefore, be entered in this case reversing the judgment of the district court, dismissing the libel of the United States, and ordering the restoration of the proceeds of goods and merchandise seized, libelled, and sold to the claimants, but allowing claimants no costs.

See *U. S. v. Three Trunks*, 8 FED. REP. 583.

AMY & Co. v. CITY OF SELMA.*

(Circuit Court, M. D. Alabama. May, 1882.)

THE ACT OF THE LEGISLATURE OF ALABAMA OF FEBRUARY 23, 1872, REPEALS THE ACT OF FEBRUARY 8, 1866.

The tax authorized to be levied to pay the principal and interest of the bonded debt of the city of Selma, and to create a sinking fund therefor, is to be in lieu of all taxes now assessed; and the act further excepts the act of 1859-60 from its operation. Hence the act of 1866, authorizing the levy of a 1 per cent. tax, is repealed.

"Including one excludes all others."

Mandamus to Levy Tax. Demurrer to return.

Pettus & Dawson, for relators.

Brooks & White, for respondents.

PARDEE, C. J. It is not necessary to state all the facts of this case in order to make my ruling understood. It is sufficient to say that relators claim a right to the levy of the specific 1 per cent. tax, as provided by the act of the Alabama legislature, approved February 8, 1866, under which act relators' bonds, now merged in judgment, were issued. The respondents, in their return, claim that the authority to levy the tax of 1 per cent. under the act of 1866, was repealed and superseded by an act of the Alabama legislature, approved February 23, 1872, entitled "An act to authorize the mayor and council of the city of Selma to establish and provide a sinking fund for the payment of the principal and interest of the bonded debt of said city."

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

And further, that subsequent to the passage of the said act, after various negotiations between relators and the agents of the city of Selma, relators accepted the terms of the act, extended the time of payment of their bonds then past due, accepted new coupons to be attached to their bonds, and for a consideration of 5 per cent., under the guise of commissions for agency, waived their rights, if any they had, to the specific tax of 1 per cent. authorized by the act of 1866. Also, that since 1872 relators have demanded, received, and accepted large sums from the sinking fund created by the act of 1872, and thereby accepted said act. There can be no doubt that the relators' rights under the act of 1866 are unaffected by the act of 1872, unless by contract or conduct they have waived such rights. The return makes the square issue of such waiver, not only by setting forth the alleged contract in writing, of date March 1, 1872, but by alleging subsequent agreements and considerations paid therefor. If the issue were made solely on the written agreement, I am inclined to think that, considering the terms of the agreement, the respondents' return might be held insufficient on demurrer. A question has been made as to whether the act of 1872 really repeals the authority given by the act of 1866 to levy the 1 per cent. tax therein specified.

I am of the opinion that a fair construction of the act of 1872 leaves no question of that kind. The tax authorized to be levied to pay the principal and interest of the bonded debt of the city of Selma, and to create a sinking fund therefor, is to be "in lieu of all taxes now assessed," and the act further excepts the act of 1859-60 from its operation. "Including one excludes all others."

For these reasons the demurrer to the return ought to be overruled, and it is so ordered.

UNITED STATES v. TICHENOR and others.

(Circuit Court, D. Oregon. June 5, 1882.)

1. RESERVATION OF PUBLIC LANDS IN OREGON.

By the passage of the donation act of September 27, 1850, (9 St. 497,) and the amendment thereto of February 14, 1853, (10 St. 158,) congress disposed of all the public lands in Oregon to persons who were or should become settlers thereon and otherwise comply with the provisions of such act, except, among others, such portions thereof as might be designated by the authority of the president for certain military purposes and "other needful public uses," not exceeding 640 acres at any one point or place for a fort, nor more than 20 acres

for any other purpose. *Held*, (1) that while an order issued by the secretary of war designating a reservation under this act for a military post or station may be presumed to have been made by the authority of the president until the contrary appears, no such presumption arises in case such order is made by any one else, and therefore an order issued by the military officer in command of the department directing the establishment of "a military reservation" at Port Orford, Oregon, is void and of no effect; (2) that a valid designation of a reservation for military or light-house purposes must indicate or describe with reasonable certainty, in some public document or record, the quantity, limits, and location of such reservation, and the same ought to be noted, as soon as practicable, on the plat of the survey of the township; and (3) that such a reservation, if designated so as to substantially exceed the quantity allowed by law, is illegal and void.

2. PATENT ISSUED CONTRARY TO LAW.

When it appears on the face of a patent that it was issued contrary to law, it is void, and a court of law will so pronounce; but nevertheless the United States is entitled to maintain a suit in equity to have such void patent cancelled.

3. POSSESSORY RIGHT OF MARRIED SETTLER.

A married settler, under the donation act, prior to completion of his residence and cultivation, may abandon or dispose of his possessory right or location without the consent of his wife.

4. LANDS—PURCHASE OF, FOR THE UNITED STATES.

A conveyance of lands to the United States is void and inoperative unless the purchase is authorized by congress. Section 3736 of the Revised Statutes.

5. FORT—MEANING OF THE TERM.

The term "fort," as used in the donation act implies a place of more permanence and strength than a mere frontier camp, post, or station.

6. PORT ORFORD.

Congress never authorized nor provided for the erection or maintenance of a "fort" at Port Orford.

7. PROMISE MADE UNDER ILLEGAL ARREST.

The arrest and eviction of the defendant William Tichenor, in 1864, from his donation claim at Port Orford, or that portion of it said to have been a "military reservation," and his subsequent imprisonment by military force and without process of law, were illegal acts, and any promise extorted from him as a condition of his liberation, concerning his future claim to the premises, was and is void and of no effect; neither would a verbal promise of non-claim, however induced or made, be sufficient to affect his right to or interest in the premises.

8. ALLEGATION OF FRAUD.

It is not sufficient to allege in a bill to set aside the patent to a "settler" that it was "fraudulently" obtained by means of "false proof," but the acts constituting the fraud should be substantially stated.

9. RESIDENCE AND CULTIVATION OF A "SETTLER."

A settler under the donation act is not required to reside "all over" his claim, nor to cultivate the whole of it, and therefore his proof of residence and cultivation is not false if he actually resided anywhere within the exterior lines of the claim and cultivated any portion of it.

10. LAPSE OF TIME.

Mere lapse of time is a defence in equity in cases not within the operation of the statute of limitations.

11. SALE OF PUBLIC LANDS.

A sale of public lands unauthorized by law is void, and the purchaser thereat acquires no right thereby, whether he knew or did not know of such want of authority.

Suit to Annul a Patent.

Rufus Mallory, for plaintiff.

William Strong, for defendants.

Edward W. McGraw filed a brief for defendants.

Before SAWYER, C. J., and DEADY, D. J.

DEADY, D. J. This suit was commenced on August 25, 1880, against the defendants William Tichenor and Elizabeth, his wife, to set aside and cancel the patent issued to said defendants on February 5, 1866, for the donation claim No. 37, the same, as alleged, being parts of sections 32 and 33 in township 32 S., of range 15 W., of the Wallamet meridian, and situate in Curry county, Oregon, so far as the same includes a certain "military reservation;" or that the defendants be declared the trustees thereof for the plaintiff, and required to convey the same to it. On April 13, 1881, a supplemental bill was filed, in which the death of the defendant Elizabeth Tichenor was alleged, and by which her children, Jacob B. Tichenor, Anna Dart, and Sarah E. McGraw, and the husbands of the two latter, George Dart and Edward W. McGraw, were made defendants in the suit. The bill alleges—

That in July, 1851, the defendant William Tichenor settled upon said donation No. 37 under the donation act of September 27, 1850, and immediately laid out a town thereon, which he called Port Orford; that in September, 1851, Lieut. Wyman, of the United States army, with the consent of William Tichenor, erected some buildings upon a portion of said town site for the use of the United States soldiers when stationed at that point; "that on October 16, 1851, Gen. Hitchcock, then in command of the United States troops stationed at that place, ordered that a military reservation be established there, and that a tract of land be selected and set apart and reserved for that purpose;" that soon after, and in pursuance of said order, said Wyman "caused a tract of land to be marked out for and as a military reserve," including the buildings aforesaid, and bounded, so far as it was within the lines of said donation, as follows: "Beginning where the east line of Redwood street in said town of Port Orford prolonged strikes the south line of Tichenor's claim; thence along said prolonged line and its continuation, the east side of Redwood street, to the south-east corner of Redwood street and Third street; thence along the south side of Third street and said side continued until it strikes the west line of Tichenor's claim, thence along said line in a southerly direction to the south-west corner of Tichenor's claim; thence along the south line of Tichenor's claim to the point of beginning,"—of which

acts said William Tichenor had notice and consented thereto, and that about March 17, 1852, said "military reservation was duly published;" that said William Tichenor and Elizabeth, his wife, released the premises "to the department quartermaster general for the use of the United States," and thereafter, on October 24, 1852, in order the more fully and certainly to secure the same to the United States, said defendants "released and quit-claimed to the United States all right or interest" in the premises, and "abandoned the same to the United States;" that on September 11, 1854, "the president of the United States formally declared a reservation for light-house purposes, at said Port Orford, that included said portion of the reservation as well as other lands not within the limits of said donation;" that about September 29, 1856, said William Tichenor made the proof of his four years' residence and cultivation upon the donation claim aforesaid, as required by said donation act, before the officers of the proper land-office, and "fraudulently" included therein so much of the reservation aforesaid as fell within the lines of his donation, "whereas, in truth and in fact, he had not so resided upon, cultivated, or claimed" the same "as part of his donation" after "the said military reservation was marked out;" that "by means of said false proof," said William Tichenor "induced the officers of the United States," on February 5, 1866, to issue a patent for the whole of said donation, including the tract so reserved, to himself and wife—the north half to the former and the south half to the latter; that the portion of said reservation included in said patent lies within the wife's half of the donation, and the said patent was so far procured by said William Tichenor "in fraud of the rights of the United States."

The bill then proceeds with a sort of a restatement of the case upon "information and belief," to the effect that after said reservation was marked out, said William Tichenor surrendered all control of the portion within his donation to the United States; that afterwards said William Tichenor was appointed collector of customs at the port of Port Orford, before which time the troops had been withdrawn from said place and the reservation left in charge of an agent of the United States; that by permission of the United States he occupied one of the buildings on said reservation as collector aforesaid, but afterwards made a claim to the same as against the United States, whereupon he was removed therefrom and the premises again placed in the charge of an agent; that in October, 1864, said William Tichenor and others drove said agent "away from said premises by force," and they were arrested therefor "by the military authorities of the United States" and imprisoned in Fort Alcatraz "for a considerable time;" that upon being released from said imprisonment said William Tichenor "pledged his word of honor that he would not interfere with or in any manner lay claim to the said reservation," but notwithstanding such pledge "he afterwards laid claim to said

land and made final proof of residence and cultivation thereof, as hereinbefore stated, and so fraudulently and wrongfully procured the patent therefor, as herein stated. The defendants demur to the bill, and for cause of demurrer say—

(1) The court has no jurisdiction because the plaintiff has an adequate remedy at law; (2) the plaintiff is not entitled to the relief asked upon the case stated; (3) the bill is multifarious; (4) it is without equity, in this: (a) The boundaries and extent of the alleged reservation are not given with any certainty or exactness, nor does it appear that it included the premises in controversy; (b) it does not appear that it was made for a "fort," nor that it does not exceed 20 acres in extent, but the contrary; (c) the reservation does not appear to have been made on public lands, nor that it was made under the authority of the president; (d) no facts constituting the alleged fraud on the part of the defendant William Tichenor are stated; (e) the alleged reservation is void, as appears from the bill; and (f) that Elizabeth did not execute a legal conveyance of the premises to the plaintiff.

There are no maps or diagrams of the locality of the Tichenor donation or the alleged reservation attached to the bill, and the description of the premises contained in it conveys no definite or certain information as to their location or quantity, unless reference is had to the public surveys. Authenticated copies of these and of the patent to the Tichenors, with a copy of the proofs upon which it issued, and the official survey of the donation No. 37 thereto attached, were submitted by counsel for the plaintiff on the argument of the demurrer, and the facts contained in them will be referred to and considered as a part of the bill, or as official acts of the executive department of the government within the judicial knowledge of the court.

And first, the bill is incorrect in describing the donation No. 37, in effect, as being only parts of sections 32 and 33 of township 31 south, of range 15 west. From the surveys it appears that said donation comprises 404.14 acres in said sections 32 and 33, and also 237.20 acres in sections 4 and 5 of township 33 south, of the same range; and that the premises in controversy in this suit lie wholly in the south-west quarter of said section 5, and probably contain not to exceed 20 acres, while the remainder of the reservation marked out as alleged in the bill lies immediately to the westward of the Tichenor donation, and taken altogether contains over 200 acres.

The allegation that the defendant, William Tichenor, after his release from Alcatraz in 1864, made final proof of his residence and cultivation on the donation No. 37, is also erroneous as appears from

the bill itself and the documents submitted therewith, said final proof having been made some eight years before that date.

On an extract from "the surveyor general's map of Oregon," at sundry points on the line of the coast, of which Port Orford is one, certain circular-shaped tracts, containing no specified quantity, were surrounded with a blue shading, and on September 11, 1854, the president indorsed thereon: "Let the tracts shaded blue on the within diagram be reserved for light-house purposes.

[Signed]

"FRANKLIN PIERCE."

On September 15, 1854, this diagram was sent by the commissioner of the general land-office to the surveyor general of Oregon, with a letter informing him that the president "has directed the reservation of a sufficient quantity of land at each point for light-house purposes, as follows: * * *, at Cape Orford or north cape of Tichenor bay;" and instructed him "to cause the same to be noted on the maps and documents" of his office, so that they would not be overlooked when the surveys of the public lands should be extended to these points; and added: "The light-house board has promised to furnish this office with descriptions of the exact locations, when made, and copies thereof will be forwarded to you when received." But it does not appear from the public surveys that any note or memorandum of any such reservation was ever entered or made thereon. In fact, no specific reservation was made or designated by the president's order. It was, in legal effect, only a precautionary direction that reservations *should* be established at the points named when the surveys were extended there; and, evidently, it was contemplated that the final location and description of them would be made by the light-house board, and furnished to the land-office for formal entry on the maps of the public surveys.

A reservation for light-house purposes at that date could only be made by authority of the president upon the assumption that it was a "needful public use," and then it could only contain 20 acres. How much land was contained within the blue lines on the diagram indorsed by the president on September 11, 1854, no one knows; nor were they intended to do more than to indicate the point or headland where such reservation should be made thereafter.

But it is now understood that so far as this case is concerned the claim that the premises in controversy are within a light-house reservation is abandoned, and it is admitted by the counsel for the plaintiff that if there is a reservation for light-house purposes at Port Orford it lies wholly to the south and west of the Tichenor donation

over on the headland. Besides, it was not in the power of the president to establish or declare a reservation for light-house purposes upon land already reserved for military or other purposes. If there was a valid reservation established at Port Orford prior to September 11, 1854, for a military post, as claimed by the plaintiff, the land contained in it was thereby appropriated and withdrawn from the public domain, and could not be thereafter otherwise appropriated, except by the authority of congress. *Wilcox v. Jackson*, 13 Pet. 513.

As to the first point made by the demurrer, it is not well taken. True, if the patent was issued contrary to law, as alleged, and that fact appeared upon the face of the patent when compared with the law, it is void, and a court of law would so pronounce. But the United States is also entitled to have such void patent cancelled, and may maintain a suit in equity for that purpose. *U. S. v. Stone*, 2 Wall. 535; *U. S. v. C. P. Ry. Co.* 9 P. C. Law J. 340; *W. S. v. Mul-lan*, 9 P. C. Law J. 116. Neither is the objection that Mrs. Tichenor's conveyance or quitclaim to the United States was not duly executed, of any moment.

At the date of the alleged conveyances the claim was occupied by the husband as a settler thereon, under the donation act, engaged in the performance of the conditions of residence and cultivation, on the completion of which the title to the land would enure to him and his wife in equal parts. In the mean time the wife had no control over or interest in the premises. She was not a settler, and her husband could occupy or dispose of or abandon his possessory right in his claim without reference to her. When her husband complied with the conditions of the act making the grant, then she became the owner, as the direct donee of the United States, of the one-half of the land included in her husband's settlement. But until then it was in the power of the husband to abandon or dispose of his location or possessory right as he saw proper, and thereafter neither he nor his wife would have any interest in the premises under the act. *Lamb v. Starr*, 1 Deady, 360; *Fields v. Squires*, Id. 366; *Hall v. Russell*, 101 U. S. 509; *Vance v. Burbank*, Id. 520.

Neither did these conveyances of William and Elizabeth Tichenor have the effect to vest any interest in the premises in the plaintiff. Irrespective of the fact that the grantors in these deeds had nothing in the premises to convey except the possessory right of the settler, William Tichenor, there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances void and inoperative. By section 7 of the act of May 1, 1820, (3 St.

568; section 3736, Rev. St.,) relating to the treasury, war, and navy departments, it is provided "that no land shall be purchased on account of the United States except under a law authorizing such purchase." It is not claimed that there was any law authorizing any one to purchase this property, and without such authority the purchase was void. 11 Op. 202.

The only effect that can be given to these writings in this case is as evidence that the settler then and thereby abandoned so much of his claim, whereupon it again became a part of the public domain, and might be appropriated by any one to any purpose or use authorized by law.

The authority to establish a reservation of the public lands in Oregon for any purpose is found in section 14 of the donation act of September 27, 1850, (9 St. 500,) and section 9 of the act of February 14, 1853, (10 St. 158,) amendatory thereof. In the first it is declared—

"That such portions of the public lands as may be designated under the authority of the president of the United States for forts, magazines, arsenals, dock-yards, and other needful public uses, shall be reserved and excepted from the operation of this act: provided, that if it shall be deemed necessary, in the judgment of the president, to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the secretary of war to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled thereto out of any money not otherwise appropriated."

The pre-emption act of September 14, 1841, (5 St. 657), was not extended over Oregon until July 17, 1854, (10 St. 305,) and this is the first act of congress providing for the disposition of or affecting the title to public lands in Oregon, unless it be the grant to certain religious societies of the missionary stations occupied by them, contained in section 1 of the act of August 14, 1848, (9 St. 323.) *Parish v. Lownsdale*, 21 How. 290; *Lownsdale v. City of Portland*, 1 Dedy, 7, 13.

By section 9 of the amendatory act, *supra*, the power of the president to reserve lands from the operation of said act was qualified, so that all reservations theretofore and thereafter made under said section 14 of the original act should be limited to an amount not exceeding 20 acres at any one place, except in the case of "forts," when the amount should not exceed 640 acres at any one place.

The power to dispose of the public lands is granted to congress. Article 4, § 3, U. S. Const.; *U. S. v. Gratiot*, 14 Pet. 537. No appro-

priation of them can be made for any purpose but by the authority of congress. *U. S. v. Fitzgerald*, 15 Pet. 421. By the donation act, congress disposed of all the public lands in Oregon to persons who should become settlers thereon and otherwise comply with the provisions of that act, except mineral lands, lands reserved for salines, and such portions thereof as might be designated by the authority of the president for "forts," etc.

The reservation must be designated—marked out—and appropriated to the permitted public use by the president or under his direction. What constitutes such a designation may be a question. At least, the reservation ought to be described or indicated with reasonable certainty as to limits and quantity, in some public document or record, and probably it ought to be noted on the maps of the public surveys. *Wilcox v. Jackson*, 13 Pet. 512; *U. S. v. Fitzgerald*, 15 Pet. 419.

But it does not appear from the public surveys that a reservation at Port Orford was ever noted thereon for any purpose. Neither is there any allegation in the bill that the reservation was ever designated or marked on the map of any survey; and, what is more, that it was designated or authorized at all, by the president.

It may be admitted, as suggested in *Wilcox v. Jackson*, 13 Pet. 513, that if the order directing the reservation to be made had been issued by the secretary of war,—the head of the department through whom the president would speak and act upon the subject,—in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the president. But neither Gen. Hitchcock nor Lieut. Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the president; and there is no presumption of law that they were. It may also be admitted that Gen. Hitchcock could direct his subaltern, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein; or that the latter might do so under the circumstances without any direction from the former. But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act, and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler.

So soon as Tichenor became a settler upon this land under the donation act there was no longer any power in the president to ap-

appropriate it for any purpose. It had thereby become private property, and could only be taken for public uses by authority of congress acting under the right of eminent domain, and upon making just compensation therefor. Fifth Amend. U. S. Const. And admitting that afterwards Tichenor abandoned the portion of his claim constituting the premises in controversy, and that it thereupon became a portion of the public domain and was liable to be reserved by the authority of the president for any of the public uses specified in the statute, still there is nothing to show that such reservation was ever made, and therefore Tichenor had the right to include it in his claim when he made his final proofs in September, 1856. But even supposing there was a valid reservation of over 200 acres established at Port Orford for military purposes prior to February 14, 1853, it became void thereafter, except as to 20 acres thereof; and until it was redesignated by proper authority, with boundaries including no more than this quantity, it had no legal existence anywhere. If there had been a reservation designated for the purpose of a "fort" it might have been extended over 640 acres; but there is no allegation in the bill that this reservation was made for such purpose, and the facts stated show plainly that it was not. The bill characterizes it as a "military reservation;" but that is a term unknown to the law and means nothing, except that it may have been intended for a fort, magazine, arsenal, camp, post, or other military use. A "fort" is something more than a mere military camp, post, or station, such as are usually established and occupied for a few years on the border between new settlements and the wild Indian tribes. The term implies a fortification or a place protected from attack by some such means as a moat, wall, or parapet. In this sense it is common knowledge that there never was a "fort" at Port Orford, or anything else than a military camp or post consisting of a few log cabins for the shelter of the troops, and the ordinary guard-house and parade ground, occupied by a small detachment of soldiers—often less than a company, under the command of a single lieutenant,—which was abandoned in the summer of 1856, at the close of the Indian war in southern Oregon, when the Indians of that region were moved up the coast, on the reservations to the north of the Umpqua river. Nor does there appear to have been any recognition of this post as a "fort" by congress, in directing it to be established, or appropriating money for buildings or fortifications there. Its occupation was a mere incident of the temporary presence of a small detachment of soldiers in that region during the settlement of Indian difficulties. Nor can the extraordi-

nary transaction related in the bill, from which it appears that in 1864—eight years after Tichenor's claim to the premises as a settler under the donation act had been proven and allowed in the local land-office—a military force, without law or process, was used to eject him therefrom, and remove him to another state and confine him there in a military prison, until he was constrained to promise not to again lay claim to the premises, have any effect upon the standing of the plaintiff in this case, unless it is to make it a party by adoption to that illegal outrage upon the rights and liberty of an American citizen. A promise made under such circumstances has no legal obligation. And if the circumstances had been otherwise, it would not have given the plaintiff any new or additional right to the property. A mere promise or agreement, without a lawful consideration, cannot affect the title to land or the right to the possession thereof.

In the bill it is alleged that the patent was "fraudulently" obtained by means of "false proof," but in what the fraud consists, or wherein the proof was false, is not stated. Such an allegation is not sufficient on demurrer. The bill should have gone further, and set forth the substance, at least, of the acts constituting the fraud; or stated wherein the proof was false. *Story*, Eq. Pl. § 251; *Oakland v. Carpenter*, 21 Cal. 663; *Semple v. Hagar*, 27 Cal. 166.

But on the argument, and in the brief filed, counsel for the plaintiff rests his case almost wholly upon the ground that Tichenor obtained the patent to the premises in controversy by the use of false proof before the local land-office, to the effect that he resided upon and cultivated the same when he did not; and tacitly abandoning the ground for relief that the premises were reserved from the operation of the donation act, and therefore the patent was so far void, it is now claimed that admitting there was no valid reservation thereof, still the patent should be cancelled on the ground that Tichenor did not reside upon and cultivate the disputed tract, as stated in his proof and recited in his patent.

Admitting that the United States may maintain a suit to annul a donation patent upon the ground that the proof of residence and cultivation upon which it issued was false, yet that is not the case attempted to be made by this bill, in which the ground of the relief sought is that the patent includes land legally reserved from settlement under the donation act, and is therefore so far void. But this argument proceeds upon the radically-erroneous assumption that the residence and cultivation required by the donation act must extend to or include every acre of the donation. On the contrary, it is only

necessary that the residence and cultivation should be on some part of the tract on which the settler "proves up." In this case the residence and cultivation of the settler was upon the tract of land—within its exterior limits—on which he notified and made his final proof; and his proof to that effect cannot be false, even if it should turn out that some portion of the tract was not open to settlement. His proof was not, as it need not have been, to the effect that he lived upon and cultivated the particular 20 acres in controversy here, or any portion of it; but only that he lived upon and cultivated some portion of a tract, not exceeding 640 acres, which included this 20 acres.

Admitting, as the plaintiff does, that Tichenor resided upon and cultivated some portion of his donation for four consecutive years, there was no falsehood in his proof to that effect, even if some other portion of it had been withdrawn from settlement by a valid reservation. It was not his duty to know whether his claim included a part of a valid reservation, and notify the land-office of the fact, but rather the duty of the government to have the reservation, if any, properly surveyed and noted on the township maps of the public surveys for the information of all concerned, none of which appears to have been done. Besides, the plaintiff has been guilty of gross laches in the premises, and its claim has become stale. The defendant William Tichenor had been in the possession of the premises as a settler, having made his final proof, for 24 years before the commencement of this suit, and had received and undisturbedly occupied the premises under his patent for 14 years prior thereto; and although the statute of limitations does not run against the United States, it is subject, nevertheless, when it comes into a court of equity to assert a claim, to the rules and defences peculiar to a court of equity. Such a defence is "the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly governs the case." Story, Eq. Pl. § 813; Story, Eq. Jur. § 1520, and authorities cited in note 3.

In this case all the elements of this defence are present, and the defendants ought to have the benefit of it.

The demurrer is sustained, and the claim of the plaintiff being stale and its bill without equity, the same is dismissed.

SAWYER, C. J., *concurring*. In my judgment the facts alleged in the bill do not show a valid reservation of the lands described therein

for any public purpose, or present any sufficient ground for equitable relief. I therefore concur in the order sustaining the demurrer and directing a decree dismissing the bill.

See Same Parties, *post*, 449. See, also, *Neilson v. Lagow*, 12 How. 98.

TERRITORIAL PROPERTY. In article 4, § 3, subd. 2 of the constitution of the United States, defining the power of congress as to the disposition of the territory or property belonging to the United States, "to dispose" means to make a sale of the lands, or otherwise to raise money from them, *(a)* and includes the sale the power to lease; *(b)* but all disposition must be by authority of congress. *(c)* "Territory" is equivalent to the word "lands," and the words "respecting the territory" refer only to the "territory" owned by the United States at the time of the adoption of the constitution. *(d)* Subsequently-acquired territory is subject to the legislation of congress as an incident to its ownership. *(e)* The right to govern is the inevitable consequence of the right to acquire. *(f)* In legislating for the territories, congress exercises the combined powers of the general and of the state governments. *(g)* It has the absolute power of governing and legislating for the territories, and may give jurisdiction to the territorial courts; *(h)* but such courts are not courts of the United States. *(i)* The general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of the states not yet given away. *(j)* "Needful rules" means appropriate legislation, *(k)* including the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation. *(l)* It can make all needful rules and regulations, but only for the disposition and protection of lands within the limits of a state. *(m)* So, it may provide that all contracts and transfers relating to such land, made before the patent issues, shall be void. *(n)* It has the absolute right to prescribe the times, conditions, and modes of transfer of the public domain, and to whom transfer shall be made, *(o)* and it has the sole power to declare the dignity and effect of United States titles; *(p)* and, when the acts of congress make a patent necessary to complete the title, no state can make anything else evidence of title; *(q)* nor can a state pass a law depriving a patentee of the possession of property by reason of delay in the transfer of title after initiation of proceedings for its acquisition. *(r)*—[ED.

(a) *Scott v. Sandford*, 19 How. 615.

(b) *U. S. v. Gratiot*, 1 McLean, 454; *S. C.* 14 Pet. 525; *Shaw's Case*, 4 Op. Atty. Gen. 437.

(c) *U. S. v. Nicoll*, 1 Paine, 646; *Seabury v. Field*, 1 Wall. 1; *U. S. v. Fitzgerald*, 15 Pet. 407; *McConnell v. Wilcox*, 2 Ill. 344.

(d) *Scott v. Sandford*, 19 How. 442.

(e) *Am. Ins. Co. v. Canter*, 1 Pet. 511.

(f) *Am. Ins. Co. v. Canter*, 1 Pet. 511; *U. S. v. Gratiot*, 14 Pet. 525; 1 McLean, 454; *Scott v. Sandford*, 19 How. 393; *Coop v. Harrison*, 16 How. 164.

(g) *Am. Ins. Co. v. Canter*, 1 Pet. 511.

(h) *Sere v. Pitot*, 6 Cranch, 332; *Satersdorfer v. Webb*, 20 How. 182.

(i) *Hunt v. Palao*, 4 How. 589; *Clinton v. En-*

glebrecht, 13 Wall. 448; explaining *Orchard v. Hughes*, 1 Wall. 73.

(j) *U. S. v. Bevens*, 8 Wheat. 337; *Smith v. Maryland*, 18 How. 71; *The Wave v. Hyer, Blatch & H.* 236; *S. C.* 2 Paine, 131.

(k) *Scott v. Sandford*, 19 How. 615.

(l) *Pollard v. Hagan*, 3 How. 212.

(m) *U. S. v. Railroad Co.* 6 McLean, 517; *Rose v. Buckland*, 17 Ill. 309; *Dyke v. McVey*, 16 Ill. 41.

(n) *Dyke v. McVey*, 16 Ill. 41; *Rose v. Buckland*, 17 Ill. 309.

(o) *Irvine v. Marshall*, 20 How. 553; *Gibson v. Chouteau*, 13 Wall. 92.

(p) *Bagnell v. Broderick*, 13 Pet. 436.

(q) *Wilcox v. Jackson*, 13 Pet. 498.

(r) *Gibson v. Chouteau*, 13 Wall. 92.

PHELAN v. O'BRIEN.

(District Court, E. D. Missouri. May 28, 1882.)

BANKRUPTCY—LIMITATIONS OF ACTIONS.—REV. ST. § 5057.

Where a deed of trust upon real estate, executed by A. to secure certain promissory notes, was foreclosed by B., who, as assignee in bankruptcy of the estate of C., held one of said notes, and all parties in interest were present or represented at the sale under said deed, and B., with the sanction of the court by which he had been appointed, became the purchaser for the benefit of C.'s estate, and, with the knowledge of A., paid the holders of the other notes their *pro rata* of the purchase money, *held*, that proceedings instituted by A. against B., more than two years after the date of said sale, to set it aside, were barred by the limitations of the bankrupt act.

In Equity.

This was a suit to quiet the title to an undivided interest in certain real estate bought by complainant on the twentieth of September, 1878, for the benefit of the estate of the Central Savings Bank, bankrupt, at a sale under a deed of trust executed by defendant, Elizabeth A. O'Brien. The bill prayed, among other things, for an injunction to restrain defendant from prosecuting a suit to set aside said sale, which she had instituted in the month of April, 1881, in the circuit court of Jackson county, Missouri. A preliminary injunction to restrain defendant from prosecuting said action was granted March 17, 1881. On May 3d of the same year said Elizabeth A. O'Brien filed a cross-bill against complainant, praying that said sale to him might be set aside, and that he be decreed to account to her for all proceeds of sales made by him of said property. The complainant in his answer to said cross-bill, pleaded, among other things, the following section of the Revised Statutes of the United States, to-wit:

"Sec. 5057. No suit, either at law or equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. * * *

The other material facts are sufficiently stated in the opinion of the court.

Walker & Walker, for complainant.

Donovan & Conroy, for defendant.

TREAT, D. J. It is not proposed to enter upon any elaborate analysis of the evidence, authorities cited, or of the rules of law invoked; for, whatever decision this court may make, will, as intimated, be reviewed by an appellate tribunal. The essential facts are that Phe-

Ian was assignee in bankruptcy of the Central Savings Bank, among whose assets was a note executed by the defendant, together with two other notes held by other persons, all secured by a deed of trust. Those notes were past due. After waiting for a long time to have the same paid, he caused the deed to be foreclosed, and he became the purchaser at the sale for the benefit of the bankrupt estate, with the sanction of this court. All the parties in interest were present at the sale, either in person or by their legal representatives. The plaintiff, as assignee in bankruptcy, paid to the holders of the other notes their *pro rata* of the purchase money. Thereupon the assignee has proceeded from time to time to sell the property thus acquired, with the consent of other parties in interest, he having only an undivided interest, and has, under the sanction of the court, made out of the proceeds of such sales dividends to the creditors of the bankrupt estate.

More than two years elapsed from the date of the foreclosure sale before the defendant instituted suit looking to the avoidance of said foreclosure. She knew that the foreclosure sale was to be made at the time when it was made; she knew that it had been made, and was charged with notice of the distribution of the proceeds thereof towards the satisfaction of her obligations.

The primary question is whether her suit is within the limitation of the bankrupt act. After an examination of the authorities this court must hold that such limitations obtain. This case shows the importance of upholding such a rule. An assignee in bankruptcy, in the administration of his trust, proceeded to enforce the collection of assets transferred to him; and in doing so it became necessary for him, in order to disentangle interests, to become the purchaser of the entangled estate, so that in managing the same he might secure for the bankrupt estate the largest sum practicable. This he did under the direction and with the sanction of the court. At the time he became such purchaser all owners of the individual interests were present or represented, knowing full well what was the property being sold and its value. The value was prospective or speculative. Bids were made by parties in interest, and the plaintiff became the purchaser for the bankrupt estate. At the date of that sale full value as then understood was obtained. From a variety of circumstances since occurring the property has greatly enhanced in value. The assignee, it seems, went beyond his legal duty, without assent of the court, in consenting that defendant might redeem. She did not redeem nor offer to redeem within two years. If there had been no advance in

values it is not probable that she would have brought suit to set aside the sale. She had extreme indulgence to redeem, of which she did not avail herself; and such indulgence by the plaintiff was not even authorized by the court. She chose to lie by waiting the chances of the rise or fall in values, and having thus waited until the bar of limitations arose she cannot now be heard. More potently should the rule be enforced in this case, because she knew that in the mean time the bankrupt estate was in the course of administration, sales being made and dividends declared.

The case is not an unusual one. It often happens that a mortgage or deed of trust is given to secure payments of a sum due, and that the property pledged does not at the sale bring the sum for which it is pledged. Unless the property thereafter enhances in value, no complaint is made. Suppose a stranger had become the purchaser at the foreclosure sale, what pretence could there be for setting the same aside after he had paid over the purchase money to the several beneficiaries entitled thereto? It might be that he made a bad purchase, and then no complaint would appear. On the other hand, as in this case, the purchase turned out to be a good one, and therefore is the rule of law to depend on the outcome of a bargain—if bad, the purchaser to be bound; but if good, to lose the benefit of his investment?

There are many considerations urged which would have great force if the case were other than that presented, such as the vagueness of the advertisement of sale, etc. It must suffice that the bar of limitations prevails.

The cross-bill is dismissed, and a decree as per the original bill will be entered.

After delivering the foregoing opinion, Judge TREAT proceeded verbally to state his views on the other questions presented outside of the statute of limitations. He said "the equities were strongly against Mrs. O'Brien; that while the notice of sale was vague, yet it followed the description in the deed, and she, being represented at the sale, could not now, after this lapse of time, be heard to complain. She knew what property was being sold. She was granted great indulgence before and after the sale under the deed of trust, but did not avail herself thereof. She waited until after, by the active exertions of Mr. Phelan, the assignee, and the owners of the other interests, the property became exceedingly valuable, and then, for the first time, sought to set aside the sale, after she had allowed the assignee to sell portions of the property, and to distribute the proceeds of the same among the creditors of the Central Savings Bank. She claims that the property was not sold under the deed of trust in lots and blocks. It is true, the property

had been subdivided, but the subdivision was only on paper. The interest sold was a one-fifth interest, and the entire property was burdened with taxes to an amount exceeding \$15,000. No intelligent person would want to buy an undivided one-fifth interest in a lot forming part of a large tract burdened with so great an amount of taxes. Mrs. O'Brien has no right at this late day to complain."

*In re WARNE, Bankrupt.**

(Circuit Court, E. D. Pennsylvania. April 29, 1882.)

1. DISCHARGE—FRAUD—GIFTS TO WIFE AND DAUGHTER.

Gifts by a bankrupt to his wife and daughter, previous to the bankruptcy, although they may be voidable by his creditors, do not necessarily involve such moral turpitude as would justify the refusal of a discharge.

2. SAME—FAILURE TO RETAKE AND DELIVER SUCH PROPERTY.

As between the bankrupt and his wife and daughter their ownership of such property is unquestionable, and his failure to retake possession and deliver such property to the assignee is not a valid objection to his discharge.

3. SAME—FALSE STATEMENT.

A false statement made by the bankrupt upon his examination, as to the existence of books of account, will not prevent his discharge if it appears that such statement was against his own interests, and apparently without motive, and the circumstances indicate that it was innocently and not wilfully made.

Appeal from decree of the district court granting a discharge. See report of case, 10 FED. REP. 377.

W. D. Luckenback, for appellants.

Hon. W. W. Schuyler and Sharp & Alleman, for appellee.

MCKENNAN, C. J. The only objections urged against the bankrupt's discharge are:

(1) That he was guilty of fraud in not delivering to his assignee certain personal property claimed by and in the possession of his wife and daughter; and (2) that he wilfully swore falsely touching the keeping of proper books of account in his business.

The first objection is unsustained by evidence which tends to prove fraud within the meaning of that section of the bankrupt act upon which the objection is founded.

The property referred to in the objection was, in part, given by the bankrupt to his daughter, and in part acquired by his wife by purchase from others. But, although the title to the property, of the apparent owners may be voidable by the bankrupt's creditors, through the assignee, as their representative, the transactions in which it

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

originates do not necessarily involve moral turpitude, which must characterize them to justify the denial of a discharge, even if they may be considered as comprehended by the terms of the objection here. *Neal v. Clark*, 95 U. S. 704.

But as between the bankrupt and his wife and daughter, their ownership of the property was unquestionable, and he could not, rightfully or legally, disturb it. Fraud, therefore, cannot be imputed to him because he did not illegally possess himself of property, the ownership of which he could not claim, and deliver it to his assignee.

The second objection is more difficult to deal with.

That the bankrupt swore falsely is incontestable. In his examination before the register, on the twenty-fifth of May, 1880, he stated that he had not kept any cash-book in his business; that he could not tell by his books what his business expenses were, nor what he took out of his business for the support of his family, nor whether they would show profit or loss.

Thereupon the register reported against his discharge. The bankrupt supposed that the assignee had taken possession of all his books, but, after the register's report, he made further search and found additional books "in the loft over the hay scales on the premises occupied by him." Upon application to the register the hearing was reopened and the books thus found produced. They were of such character as, in the judgment of the register, to supply the deficiency in the bankrupt's accounts, and he changed his report. The bankrupt was also examined before him, and explained his former statement generally thus: That he was in delicate health and frequently sick; that he was greatly disturbed in mind by his embarrassments; and that at the time of his examination his memory had entirely failed as to the existence of the books afterwards found.

Now, was the statement of the bankrupt on the twenty-fifth of May, 1880, *wilfully* false? Unless this satisfactorily appears, his discharge cannot be refused. There are but two hypotheses to account for the bankrupt's conduct. Either in the very wantonness of depravity he made a false statement to his own prejudice, or his statement was unintentionally untrue. He had applied for his discharge, and the inquiry on which he was examined was as to whether he had complied with the law, and was entitled to be discharged. He was bound to know, and must have known, that his failure to keep the books, about which he was asked, would necessarily preclude the allowance of his discharge. Is it within the range of probability, then, that he would wilfully and falsely deny the existence of a fact within his recollection at the time,

which he knew would defeat the object he was earnestly seeking to accomplish? Such an assumption is irrational, because it is utterly repugnant to any supposable motive of human action. Not only was the bankrupt without motive to swear to a falsehood, but he was drawn by the strongest of motives in the other direction. A statement of the simple truth was a decisive condition of his success, and it would require demonstrative proof to warrant the conclusion that he was laboring to defeat what it was conducive to his own interests to promote and accomplish. And this hypothesis is not without support in this, that the books produced are not suggested not to be what they purport to be, proper books of account honestly kept.

Although, then, I have some misgivings, I think the safest and most charitable explanation of the bankrupt's conduct is that he was unintentionally mistaken in his statement of May 25th, and therefore that his discharge ought not to be denied.

And so it is ordered that a decree for his discharge be entered in the usual form.

In re ALLIN, Bankrupt.

(District Court, D. Vermont. June 14, 1882.)

1. REDEMPTION—HOLDER OF EQUITY—RIGHTS OF.

The owner of the equity of redemption of a mortgage has the right to pay it off to save his estate and protect it against subsequent purchasers and encumbrancers, but he has not the right to take the debt from the mortgagee, as a purchaser, without the consent of the mortgagee, so as to hold it as a debt against the mortgagor.

2. SAME—PURCHASER—WHAT ESTATE TAKES.

So where a bankrupt, after proceedings in bankruptcy, under the laws of the state conveyed his homestead interest to further secure a mortgage debt, and another debt since adjudged fraudulent and void as to his assignees, and the farm was afterwards, under order of the court, sold free of the homestead but subject to the mortgage, the avails of the sale being paid into court to stand in lieu of the homestead interest, the purchaser takes only the equity of redemption, which includes the homestead interest, and he is not entitled to the fund in the registry to apply it to the payment of the debt; his whole estate being the farm, subject to the mortgage debt.

In Bankruptcy.

W. & H. Haywood, for petitioner.

Ladd & Fletcher, for contra.

WHEELER, D. J. The bankrupt had a homestead right to the value of \$500, if there should be so much, in a farm subject to a mortgage held by Henry L. Tilton. After the commencement of the proceedings in bankruptcy the bankrupt and his wife, in accordance with the laws of the state, conveyed the homestead interest to Tilton to further secure this mortgage debt and another debt, since then adjudged fraudulent and void as to the assignee representing the other creditors. The farm has been sold, free of the homestead but subject to the mortgage, to Jacob Benton, for \$501, under an order of court, by the terms of which the avails of the sale to the amount of the homestead interest were to be paid into court to stand in lieu of the homestead. Benton has filed his petition to have this money, \$500, now in the registry and subject to the order of the court, decreed to him, as being entitled thereto by virtue of his purchase. Tilton and the bankrupt have appeared in opposition to the petition. These facts appear from a report of the register, agreed to as a statement, and the cause has been heard thereon. The petitioner's claim of right to the money rests principally upon the supposition that by purchasing the equity of redemption of the farm he became entitled to pay off and take the mortgage, and be subrogated to the rights of the mortgagee as to all securities, and that the whole of the homestead right is to be held for this debt on account of the invalidity of the other.

It is true, generally, that the purchase of a debt draws with the debt the securities for the payment of it, unless a contrary intention and agreement appears; and, if the petitioner stands as a purchaser of this mortgage debt, or with the right to pay it off and take it with all the rights of a purchaser, he does have the right to this homestead security for the debt, in whole, if there is no other debt to which it is applicable, and proportionately, if there is another debt to which it is to apply. He purchased nothing of Tilton or of the bankrupt. He merely purchased the equity of redemption of the mortgaged estate and whatever rights belong to that. The homestead right, what there was of it,—and by the sale to the petitioner it is proved to be to the amount of \$500,—was independent of the mortgage, and stands, as to this question, as a separate estate.

The owner of the equity of redemption of a mortgage has the right to pay it off to save his estate in the mortgaged premises, and to stand upon it as valid to protect his estate against subsequent purchasers or encumbrancers; but he does not have the right to take the debt from the mortgagee, as a purchaser, without the consent of the

mortgagee, so as to hold it as a debt against the mortgagor. As to the mortgagee, he has the right merely to pay it off; as to the mortgaged estate, he has the right to stand upon it in aid of his title; as to the mortgagor, he can do nothing with it before he pays it off, for until then he has no right to it in any sense; nor after he has paid it off, for then, as to the mortgagee, it is paid, and also as to the mortgagor.

It probably would not be claimed that after an owner of the equity of redemption of a mortgaged estate had paid off the mortgage he, or any one, could maintain an action upon the debt against the mortgagor. The debt, as to him, would be extinguished. So, here, the petitioner can, by paying off this mortgage debt, have no claim against the bankrupt; and, as there is no debt to follow the paying off, there can be nothing to carry the securities belonging to the debt. The homestead right was never applied in payment of the debt, but has always been left as a mere security for it. If it had been actually applied there would be so much less for the petitioner to redeem; but it has not. As the case stands Tilton may have two securities for the same debt—one against the interest in the farm aside from the homestead in the hands of the petitioner, and the other against the homestead interest in the hands of the bankrupt.

Neither the bankrupt nor the petitioner can acquire any right to the other's interest without consent of the other, unless it be through Tilton. The bankrupt could, apparently, as well reach the petitioner's interest by paying off the mortgage as the petitioner could the bankrupt's. But, in fact, as this matter is now viewed, neither can of right do anything with Tilton but to pay off the debt, nor anything with the debt afterwards but to protect his own estate. The petitioner's estate is the farm, aside from the homestead interest; the bankrupt's estate is the homestead interest, for this purpose; and neither has any rights as against the other outside of his own estate.

By operation of law the homestead estate has been transferred to the money paid by the petitioner for it, and the petitioner has become entitled to the homestead interest in the farm, so that the petitioner has the whole estate in the farm subject to the mortgage, and the bankrupt's estate is in the money; but this makes no difference. As it now is, the petitioner has no right outside the farm as against the bankrupt, nor the bankrupt outside the money as against the petitioner.

The prayer of the petition is denied, and the petition is dismissed.

**PERRY and another, Trustees, etc., v. Co-OPERATIVE FOUNDRY Co.
and others.**

(Circuit Court, N. D. New York. May 8, 1882.)

1. PATENTS FOR INVENTIONS—COMBINATION.

In a reissued patent for an "improvement in coal stoves," adjoining flues at the rear, with walls built on the casing of the same, in combination with illuminating doors or windows in the draft chamber, base section, is not a patentable combination.

2. SAME—GRATE OR FIRE-BED.

A grate or fire-bed, made in sections and placed below the base of the combustion chamber, as a substitute for an old grate made in one part, and a combination of transparent windows in an ash-pit, is not an invention.

3. SAME—SUBSTITUTION.

The substitution, in a combination for a fire chamber with its clinker-discharge end non-grated, of a fire chamber with a grated clinker-discharge end, makes the claim invalid.

4. SAME—ENLARGING SPACE.

There is no patentable invention in the idea of contracting the lower end of the fire-pot, for the purpose of lessening the area of the grate, to enlarge the outside space.

5. SAME—COMBINING OLD FEATURES.

The aggregation, of prior reversible flues with features which before existed in union in the same stove, operating together in the same way, in a stove without reversible flues, is not a patentable combination.

BLATCHFORD, C. J. This suit is brought on four patents: (1) Reissued letters patent, No. 6,709, granted to Perry & Co., October 19, 1875, for an "improvement in coal stoves," the original patent, No. 50,073, having been granted to Zebulon Hunt, as inventor, September 19, 1865; (2) reissued letters patent, No. 5,894, granted to John S. Perry, June 2, 1874, for an "improvement in stoves," the original patent, No. 67,283, having been granted to Charles H. Frost, as inventor, July 30, 1867; (3) reissued letters patent, No. 6,206, Division A, for an "improvement in base-burning stoves," granted to James Spear, January 5, 1875, the original patent, No. 100,335, having been granted to said Spear, as inventor, March 1, 1870, and reissued to him in two divisions, Nos. 5,459 and 5,460, June 17, 1873, and again reissued in two divisions, January 5, 1875, No. 6,206, Division A, and No. 6,207, Division B; (4) letters patent, No. 183,545, for an "improvement in heating stoves," granted to Andrew Dickey and John S. Perry, as inventors, October 24, 1876.

1. As to the Hunt patent, the only claim alleged to have been infringed by the defendants is claim 3. That claim is this: "The

adjoining flues, D and D' situated at the rear of the stove, and having walls built on the casing of the same, in combination with the illuminating doors or windows in the draft chamber, base section." It is clear that this is not a patentable combination. The flues operate in the same manner, whether there are illuminating windows in the place designated or not; and the operation of such windows is the same whether the flues are arranged as described or not. The case is within the principle decided in *Hailes v. Van Wormer*, 20 Wall. 353, 368; *Reckendorfer v. Faber*, 92 U. S. 347, 357; and *Pickering v. McCullough*, Supreme Court, U. S. No. 155, October term, 1881.

2. As to the Frost patent, the original patent contained only one claim, as follows:

"So arranging the cylinder, *a*, and the direct and indirect draft openings and passages, that the said cylinder becomes an ascending channel for the escape of the products of combustion when the draft is direct, and a descending channel for the supply of air to the fire when the draft is indirect, substantially as set forth."

The reissue has 15 claims. A disclaimer of claims 2, 3, and 9 of the reissue has been filed. Infringement is alleged of claims 4 and 11, which are as follows:

"(4) A grate or fire-bed with its central and outer sections made separately and placed in a plane below the base of the fire-pot or combustion chamber proper, within the draft chamber, base section, and isolated from the walls of the same, substantially as shown and described." "(11) The combination of mica or other transparent windows in the walls of the draft chamber, base section, a grate or fire-bed placed in a plane below the base of the fire-pot or combustion chamber proper, the free open space funnel between the same, and the said grate or fire-bed, isolated from the walls of the said draft chamber, base section, substantially as shown and described."

It is shown that prior to Frost's invention fire-grates, with their central and outer sections made separately, existed; and grates made in one part existed; and grates not touching the walls of the chamber in which they were placed, existed; and grates arranged with relation to the fire-pot so as to leave an anti-clinker opening above the grate and below the base of the fire-pot existed; and grates of larger area than that of the base of the fire-pot existed; and illuminating windows in various parts of the walls of the stove existed. Claim 2, so disclaimed, covered the same combination as claim 4, omitting the feature of the separation of the central and outer sections of the grate. There was no invention in substituting in the given combination an old grate made in two parts for another old grate made in one part, preserving the same relation of the grate to the fire-pot and

to the ash-pit walls, when no distinctive effect in the combination resulted from the substitution. That is this case as to claim 4. As to claim 11, it is for the combination of transparent windows in the walls of the ash-pit with the disclaimed arrangement in claim 2. A window in an ash-pit cannot modify or affect the action or operation of the grate or of the anti-clinker space, or the isolation of the grate, nor is the operation or use of the windows affected or modified by the existence or non-existence of any of those features. There was no invention in claim 11.

3. As to the Spear patent, the claims alleged to have been infringed are claims 4, 6, 7, 8, and 12, which are as follows:

"(4) The combination of a fire chamber, having its clinker-discharge end, E, grated or illuminating, and projecting downward within the air chamber, S, a grate surface or fire-bed projecting beyond the inside diameter of the grate and clinker-discharge end of the fire chamber, and the clinker-cleaning opening, R, substantially as herein described." "(6) The combination of the vertical clinker-cleaning opening, R, and mica lights, d^2 , in doors opposite the opening, substantially as herein described." "(7) The combination of the vertical clinker-cleaning opening, R, mica lights, d^2 , and clinker-cleaning doors, C, opposite the opening, substantially as herein described." "(8) The combination of a fire chamber, the clinker-cleaning opening, R, between the fire chamber and grate surface, clinker-cleaning doors, C, opposite the said opening, and mica lights, d^1 , opposite the illuminating section, E, of the fire chamber, substantially as described." "(12) The combination of a fire chamber, having its grate and clinker-discharge end contracted and projecting downward, a grate-ring, K, and a clinker-cleaning opening, R, above the ring, substantially as herein described."

There existed in prior structures a fire chamber having its clinker-discharge end grated or illuminating, and projecting downward into an air chamber; a grate surface or fire-bed projecting beyond the inside diameter of the clinker-discharge end of the fire chamber; and a clinker-cleaning opening between the grate surface and the fire chamber above it. There also existed before, in combination, a fire chamber with its non-grated clinker-discharge end projecting downward into an air chamber, a grate surface or fire-bed projecting beyond the inside diameter of the clinker-discharge end of the fire chamber, and a clinker-cleaning opening between the grate surface and the fire chamber above it. It was no invention to substitute in such combination, for a fire chamber with its clinker-discharge end non-grated, a fire chamber with a grated clinker-discharge end. The substitution worked no change in the operation of the laterally-projecting grate-surface end of the clinker-cleaning opening in unison

with a fire chamber having its clinker-discharge end projecting downward into the air chamber. This makes claim 4 invalid.

As to claims 6, 7, and 8 there is no patentable combination between the mica lights and the other elements in those several claims.

Claim 12 remains to be considered. The clinker-cleaning opening is made by having a grate-ring and a space above it between it and the lower end of the fire-pot. The main idea embodied in the claim is the inward contraction of the lower end of the fire-pot. The specification says that the inventor, instead of making the lower section of the fire chamber cylindrical, makes its clinker-discharge end smaller in diameter than the fire-pot above, so that he can use a broad laterally-projecting grate surface without enlarging the air chamber below into which such clinker-discharge end projects downwardly, to the extent that would be necessary were the fire-pot of the same diameter throughout. The proofs show several prior instances of fire-pots with their clinker-discharge ends contracted and projecting downwardly, and provided with fire-beds or grates of less area than would have been necessary if the area of the base of the fire-pot had been equal to its area above; and of grates larger in area than the fire chamber above, with a clinker-cleaning opening between the grate and such fire chamber. Contracting the fire-pot necessarily allows the grate to be contracted, and makes more space than there otherwise would be between the outer circumference of the grate and the wall of the chamber. There is no relation or co-action between the contracted lower end of Spear's fire-pot and the laterally-projecting grate and the space outside of the grate which did not exist between the lower ends of the uncontracted fire-pots and the projecting grates and the outside spaces in prior structures. In view of all this there was no patentable invention in the idea that contracting the lower end of the fire-pot, with the consequent lessening of the area of the grate, would enlarge the outside space.

4. As to the Dickey and Perry patent, the only claim alleged to have been infringed is claim 2, which is as follows:

"The combination of ascending and descending flues placed in the rear of a stove, a free open space between the top of the grate and the lower end of the fire-pot sufficiently large to permit the removal of clinkers and other obstructions, illuminating windows opposite said space, and a grate or fire-bed having an open space between it and the walls of the stove, to admit of clinkers and other obstructions being dropped between the grate and said walls of the stove into the ash-pit, substantially as described."

This claim is merely for an aggregation of prior reversible flues with the other three features before existing in unison in the same stove, namely, an anti-clinker opening, mica windows, and an isolated grate, and does not contain any patentable invention. The last-named three features operate together in the same way in a stove without reversible flues and in a stove with them, and no combined patentable result is due to the union.

The bill is dismissed, with costs.

ADAMS & WESTLAKE MANUF'G Co. v. MEYROSE and another.*

(Circuit Court, E. D. Missouri. April 27, 1882.)

PATENTS—PLEADING—DEMURRER.

The question of whether or not reissued letters patent sued on in an action for an infringement are broader and cover things not comprehended by original letters patent, upon which they are based, is not examinable on demurrer to the bill where the original letters patent are not set out in nor attached as an exhibit to the bill, and profert thereof is not made.

Demurrer to Bill.

This is a suit for an infringement of reissued letters patent for a new and useful improvement in lanterns. The bill states that the original letters patent were issued to one J. H. Miltmore August 8, 1865; that said patentee surrendered the same, and that reissued letters patent were issued to him on the ninth of April, 1867; that on the nineteenth of October, 1880, the complainant being the sole owner and assignee of said reissued letters patent, and the said patentee thereto consenting, surrendered said reissued letters patent, and made application for a reissue of the same, with an amended description and claim thereto attached; and that on the nineteenth day of October, 1880, the reissued letters patent of the United States sued on were issued and delivered to complainant. Profert of the last, but not of the first, reissued or original letters patent is made, and a copy of the letters patent sued on is annexed to the bill as Exhibit A.

The infringement is alleged in the following language:

"Yet the said defendants, well knowing the premises, as your orator believes, and without your orator's consent or allowance, and without right, and in violation of the aforesaid rights of your orator, have, within the state

*Reported by B. F. Rex, Esq., of the St. Louis bar.

of Missouri and elsewhere in the United States, made, used, and vended, and are still making, using, and vending to others to be used, numbers of lanterns," etc.

In conclusion, the bill asks for a discovery for damages, and for an injunction.

The defendant demurred to the bill on the grounds, among others—

"That it is apparent from the letters patent and reissues thereof stated, and profert of which is by said bill made and taken as a part thereof, that said reissues, especially reissue No. 9,422, marked as Exhibit A to complainant's bill, is broader, and covers things not comprehended by letters patent No. 49,290, dated August 8, 1865, the original letters upon which said reissues are founded."

—And filed a copy of the original patent with the demurrer.

Noble & Orrick and Coburn & Thatcher, for complainant.

Edward J. O'Brien, for defendants.

TREAT, D. J. As intimated at the hearing on the demurrer, the questions designed to be presented concerning the reissue are not before the court in such form as to enable a decision to be had. The defendant will, therefore, have to answer.

The demurrer is overruled, and leave given to answer within 10 days.

NIELSON v. READ.*

(District Court, E. D. Pennsylvania. May 19, 1882.)

1. LIQUIDATED DAMAGES—CHARTER-PARTY.

Where the sum named is intelligently and unequivocally stated to be the ascertained or liquidated damages for the breach of a contract, and the language is not qualified or rendered doubtful by other expressions contained in the paper; and especially where the actual extent of damage is difficult of ascertainment, and the sum named is not very greatly in excess of the probable injury,—the amount will be treated as liquidated damages.

2. SAME—COMMISSIONS.

A charter provided that the cargo should be delivered to the consignees, "to whom the vessel is to be addressed inwards and outwards, paying a commission of $2\frac{1}{2}$ per cent. on total amounts of freight; * * * the captain to employ charterers or their nominees, at ports of loading and discharge, for business, on usual terms; failing which they or their agents shall be at liberty to deduct from the freight the sum of 50 guineas liquidated damages." The captain did not employ the charterers for his outward business. *Held*, that the $2\frac{1}{2}$ per cent. commission on the outward freight was incident to the employment

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

stipulated for, and therefore could not be recovered in addition to the damage for the loss of the employment. *Held, further*, that the 50 guineas were liquidated damages and not penalty, and could be deducted from the freight by the charterers.

Libel in personam by the master of a vessel against a charterer to recover a balance of freight alleged to be due. Respondents claimed a set-off. The testimony disclosed the following facts:

Respondents chartered the vessel to transport iron ore from Carthagena to New York, consigned to respondents. The charter-party stipulated that the ore should be delivered to the consignees, "to whom the vessel is to be addressed inwards and outwards, paying a commission of $2\frac{1}{2}$ per cent. on total amounts of freights; * * * the captain to employ charterers or their nominees, at ports of loading and discharge, for business, on usual terms; failing which they or their agents shall be at liberty to deduct from the freight the sum of 50 guineas liquidated damages." Upon the arrival of the vessel in New York she was boarded by the agent of the firm of brokers who had represented the vessel on previous voyages. The agent took the captain to the office of the latter firm, who, after looking at the charter, told the captain that they could not undertake his inward business, because that under the charter belonged to respondents; but that they would attend to his outward business. Neither they nor the captain at this time noticed that the vessel was addressed to respondents outwards as well as inwards. Subsequently, however, the captain called on respondents, and his attention was called to the stipulation for the outward business. Some conversation then occurred between the parties, but without definite result; the captain apparently not being satisfied that he was liable to commissions under that stipulation. Subsequently the captain visited respondents' office a number of times, but no arrangement was made with them for an outward charter, and eventually a charter was obtained for the vessel by the brokers on whom the captain had first called. There was evidence that at some time after the arrival of the vessel, whether before or after her outward charter did not clearly appear, the respondents' firm had gone into voluntary liquidation, one of the partners continuing the business under the old name. When the captain demanded from respondents the balance due for freight, the latter claimed that in consequence of his refusal to give them his outward business they were entitled to set off \$75 for outward commissions, and \$250 for the liquidated damages for violation of the charter. The captain denied all liability for such commissions or damages, claiming that he had given respondents an opportunity to obtain an outward charter, and that they had failed to do so. He then filed this libel, to which respondents filed an answer reasserting their claim for both commissions and damages, but offering to pay the balance of freight, less the damages alone, and also to pay the costs up to that time. This offer libellant declined.

With regard to the damage suffered by respondents by the loss of the outward business libellant claimed that it was only about \$81, while respondents claimed that it amounted to about \$114, besides a possible loss of \$40 to \$50 dispatch money, and the incidental advantage of securing a new client and extending their business.

Walter George Smith and Francis Rawle, for libellant.

Charles Gibbons, Jr., for respondents.

BUTLER, D. J. The liability for freight is not denied; but the respondents claim a set-off, (1) of £4, 8, 8, consignee's inward commissions; (2) \$148.70, vessel's bills paid; (3) \$75, consignee's outward commissions, and (4) \$250, damages for violation of contract,—respecting employment at New York. The first and second items are not disputed. The third cannot be allowed. These commissions would have accrued to respondents if they had been employed in New York, and again become consignees of the cargo. The provision, in effect, is that the consignees, to whom the vessel is to be addressed, inward and outward, shall be paid $2\frac{1}{2}$ per cent. on amount of freight. The commissions involved were an incident of the employment stipulated for, in New York; and the loss is included in the consequences of libellant's failure to observe this stipulation,—if he did so fail. The only questions in the case, therefore, are: Did libellant fail in this respect? and, if he did, what sum should be paid as damages? That he did so fail I have no doubt. Having employed another, the burden is on him to show that respondents declined the service. The witness on whom he relies to prove this—(though interested to help him out, having been the runner, or drummer, of another firm, and having succeeded in capturing the business,)—very distinctly says that he secured the employment immediately upon the vessel's arrival, without consultation with respondents. When the respondents' office was subsequently visited it was on account of other business. It is quite clear they were afforded no opportunity to furnish the outward cargo. The master indeed seems entirely to have overlooked his obligation in this respect; and the witness, (who secured the business for his employers,) says he was unaware of the obligation. No change had occurred in the respondents' firm that justified the master's course. They could, and we must suppose would, have performed the service, if employed to do so. What compensation should they have for the loss of this employment? The contract says fifty guineas,—deducted from the freight. The libellant's position, that this is a "penalty," is unsound. The precise extent of injury likely to ensue from loss of such employment is difficult to ascertain; and the probable amount, looking at incidental disadvantages, is not very greatly in excess of the sum named. The parties have expressly stated it to be the amount which shall be paid, and have pointed out the manner of securing its payment. It is unnecessary to enter upon the learning respecting "liquidated

damages." Where the sum named is intelligently and unequivocally stated to be the ascertained or liquidated damages for breach of a contract, and the language is not qualified or rendered doubtful by other expressions contained in the paper,—and especially where the actual extent of damage is difficult of ascertainment, and the sum named is not very greatly in excess of the probable injury, the amount will be treated as "liquidated damages." Such are the circumstances here; and the 50 guineas, in addition to the two undisputed sums before referred to, must be deducted from the freight. For the balance thus ascertained, less respondents' costs since filing his answer, the libellant will receive a decree, with costs to the date of filing answer. The respondents having tendered payment of the amount now found to be due, with costs at the time of making answer, should not only not be charged with costs since that time, but should be reimbursed what they have necessarily expended in making defence.

THE JOHN F. TOLLE.*

(Circuit Court, E. D. Louisiana. June, 1881.)

ADMIRALTY—COLLISION.

In a case of collision, a steam-boat is clearly in fault in not having a licensed pilot at the wheel, and a proper officer in charge, on watch, and in not being in her place in the river.

Admiralty Appeal.

Charles B. Singleton and Richard H. Browne, for libellants.

J. Ad. Rozier, for claimants.

PARDEE, C. J. This cause came on to be heard on the transcript of the record from the district court of the United States for this district, and was argued by counsel; on consideration, whereof the court, being fully advised in the premises, finds the following conclusions of fact:

1. The steam-boat Bill Henderson, of about 93 tons burden, of which libellants, W. J. Cooley, Lyman I. Taylor, L. W. Bowen, and George L. Short were owners, and said W. J. Cooley, master, departed on or about February 17, 1876, from the Tensas river, bound on a voyage to the port of New Orleans, with a cargo of cotton seed and seed cotton. The said Henderson was built in the year 1861, and,

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

with her machinery and furniture, cargo, personal effects, etc., was worth about the sum of \$5,038.

2. That the said Henderson was manned with one captain, also licensed to act as pilot, and one engineer, one acting unlicensed pilot, and sufficiency of other officers and men. That Cuney, acting pilot of the Henderson, was not licensed, his former license having expired some eight months previously and not renewed.

3. That the said Henderson proceeded on her voyage without accident until about 3 A. M. of the eighteenth day of February, when, in the vicinity of Port Hickey, in the Mississippi river, about two miles below Port Hudson, she collided with the steam-boat John F. Tolle, from the effects of which the Henderson soon after sunk and became a total loss.

4. That opposite Port Hickey there is a point of considerable sharpness, the river there making a turn of nearly a right angle, and below a bar and eddy on the same side, of nearly three-quarters of a mile in length, extending out in the river about 400 feet; the river at that place being about one mile wide.

5. That the Henderson rounded the said point, and while under the same she was signaled by the John F. Tolle with two sounds of the steam-whistle, which were promptly answered by the Henderson. At this time the John F. Tolle was ascending the river on the west side, about three-fourths of a mile below the said point, but was further out in the river than the Henderson.

6. That the said signals so given and answered indicated that the said boats were to pass each other by the larboard, and were proper signals under the rules of navigations as the boats then stood.

7. That, following the said signals, each boat kept straight ahead until the pilot of the Tolle, seeing the near approach of the Henderson, stopped his engines and commenced backing his boat. The Henderson kept her course descending the river, approaching the Tolle, still nearer to the western bank than the Tolle, until, when within about 75 yards, she turned her head towards the middle of the river to pass, as she should, on the outside, but too late; her own headway and the current swept her against the Tolle, broadside, breaking her hull, filling her with water, and sinking her as far as her cargo would permit.

8. That at the time of the collision the Henderson had no licensed and qualified officer on watch, nor any licensed and qualified pilot on watch, and she was about 100 yards from the west bank of the river, and had followed near that bank after turning the point, and after

the passing signals had been given by the Tolle and answered by the Henderson.

9. That the John M. Tolle, prior to and at the time of the collision, was properly officered and manned, having a licensed officer on deck in charge, a licensed pilot at the wheel, and watches duly set on the lookout, and her lights properly set and screened.

10. That the course of the Tolle, after passing the chute on the right of Prophet's island, was across the river to the west bank, and along that bank within a distance of 100 to 200 yards from shore, and so continued up to the collision.

11. That before the collision, when the boats were approaching and near to each other, the engines of both boats were stopped, and the engines of the Tolle were set to backing, but neither boat had lost heading when the collision occurred.

And, as conclusions of law, the court finds:

1. The Henderson was clearly in fault in not having a licensed pilot at the wheel and a proper officer in charge on watch, and in not being in her proper place in the river.

2. The John F. Tolle was not in fault, as she was properly officered and piloted, and was in her proper place in the river as the ascending boat, and according to the signals given and answered.

3. The libel should be dismissed, with costs.

THE FANNIE TUTHILL.

(District Court, N. D. Ohio, E. D. 1882.)

1. TUG—DUTY OF—CONTROL OF NAVIGATION.

In the towing of vessels without motive power the tug is to be regarded as the dominant mind or will of the adventure, and the details of immediate navigation, with reference to approaching vessels, must be left to a great extent to those on board of her.

2. SAME—MEASURE OF ACCOUNTABILITY.

They are not regarded as common carriers, as to accountability, but are only required to use reasonable and ordinary care in their business—the skill and ability ordinarily possessed and exercised by those engaged in that business—towards the tows in their charge.

3. COLLISION—WITH VESSEL AT DOCK.

Where a vessel was lying at a dock on the east side of the river, and a barge, in charge of a tug coming up the river, sheered to starboard, when the tug pulled her towards port to avoid another tug and tow coming down the river,

and directed the tow to steady her wheel, but the tow, by mistake, in porting her wheel sheered towards the barge fastened at the dock, when the tug tried to pull her towards the west side of the river, but failed, and the tow came into collision with the barge at the dock, *held*, that the master of the tug, in supposing he could pull the tow far enough to the west to avoid collision, was mistaken, and that he tried the expedient too long, and until the barge was so near that the accident of slipping of the tow line out of the chock of the tow, occasioned by hard pulling, precipitated the collision, which could have been avoided by allowing the tow to sheer and strike the dock below the vessel moored thereat.

In Admiralty.

H. D. Goulder, for libellants.

Charles L. Fish, for tug Tuthill.

S. O. Griswold, for barge Harvest.

WELKER, D. J. The barge Minnie Davis, owned by the libellants, was fastened to the dock on the east side of the Cuyahoga river, near the foot of St. Clair street, in the city of Cleveland, on the morning of the eighth of October, 1880. The tug Tuthill, towing the barge Harvest, came up the river and passed on the west side of the draw-bridge at Main street, and some 400 or 500 feet above the bridge passed the tug Castle, having in tow two canal-boats going down the river on the port side of the Tuthill. Just before meeting the tug Castle with the canal-boats the Harvest sheered to the starboard, and the Tuthill pulled her towards port, and then passed the down-going tug and tows. The Harvest was then directed to steady her wheel, but soon she sheered towards the port side in the direction of the Minnie Davis. The helm of the Harvest, by mistake, was put hard a-port, which sent her to the port side of the river, when it should have been put starboard to avoid the port side of the river. The tug tried to pull her into the river towards the west side, but failed to do it, and the Harvest ran into the stern of the Minnie Davis, doing her great damage. When the Harvest sheered to the port side she was some 400 or 500 feet from the Davis, and two-thirds across the river at that point.

There is no doubt but that the Harvest was careless and at fault in the manner in which her helm was placed. It had been placed exactly wrong, and thereby contributed to the injury of the Davis.

The question about which there is some doubt is whether the tug was also at fault in the manner in which she tried to prevent the collision. It would seem curious that in broad daylight in the river the tug and tow could not avoid hitting the Davis, lying fastened to the dock in full sight as she was.

In the towing of vessels without motive power the tug is to be regarded as the dominant mind or will in the adventure. It is the duty of the tow to follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere is incumbent on the tow. 94 U. S. 496.

The details of the immediate navigation of the tug, with reference to approaching vessels, must necessarily be left, to a great extent, to those on board of her. 103 U. S. 702.

In the discharge of the duty of towing vessels tugs are not to be regarded as common carriers and held to accountability as such. They are only required to use reasonable and ordinary care in their business—the skill and ability ordinarily possessed and exercised by those engaged in that business towards the tows in their charge.

In this case the Minnie Davis, lying at the dock, powerless, as she was, it was the duty of the tug, as well as the barge, to use all reasonable care to avoid an injury to her. It is claimed that the tug did all she could to prevent the collision. The evidence warrants the conclusion that she did not. It is evident that the master of the tug supposed he could pull the Harvest far enough from the port side of the river to avoid the collision. In this he was mistaken. He tried the expedient too long, until the barge got so near that the accident of the slipping of the tow-line out of the chock of the Harvest, occasioned by hard pulling, immediately precipitated the Harvest into the Davis. When the Harvest first sheered to the port side the evidence shows that the tug was some 400 or 500 feet from the Davis. It was its duty, then, if it was seen that the helm of the Harvest was wrong, to have it corrected, or use all means to stop the barge and avoid the collision in case it was not immediately corrected. This it did not do. The collision could have been avoided if the tug had allowed the Harvest to sheer over to the port side, as her rudder would have sent her, and thus struck the dock below the Davis. The tug was also at fault in increasing the speed of the barge by her hard pulling as it passed the down-going tug, and her continued pulling against the rudder of the Harvest. This, no doubt, aided the collision of the vessels.

Decree for libellants against both defendants, and referred to Earl Bill, commissioner, to report damages.

UNITED STATES v. MCGRAW. (No. 664.,

UNITED STATES v. MESERVEY and another. (No. 665.)

UNITED STATES v. TICHENOR and others. (No. 666.)

*(Circuit Court, D. Oregon. June, 1882.)***1. PUBLIC LAND—SUITS TO ANNUL PATENTS—INSUFFICIENT ALLEGATIONS.**

In a suit by plaintiff to annul certain patents issued by it to defendants on the ground that they were issued contrary to law, and in fraud of the rights of plaintiff, because the lands included therein were a part of a "military reservation" lawfully established at Port Orford prior thereto, and which was known to defendants prior to entry upon the same, the allegation of fraud is insufficient, as it was not the duty of defendants to inform the officers of the plaintiff that these lands had been lawfully reserved from sale, even if such was the case.

2. RESERVATION OF LAND FROM SALE—AUTHORITY TO MAKE.

Where it does not appear that any reservation was ever made by the authority of the president, and it does appear that the alleged reservation included more than 200 acres, while the law since February 14, 1853, limited the amount which might be reserved at one place for any purpose other than a "fort" to 20 acres; and while a reservation of 640 acres might lawfully have been made for a "fort," but it does not appear that a "fort" was ever established at Port Orford—no reservation was in fact lawfully established.

3. SAME—VOID RESERVATION.

The alleged order of the secretary of war, by which it was directed that the "post" at Port Orford be made permanent according to previous action, signifies that it related to the "post" and not to a reservation, and the object seems to have been not to make or ratify a reservation at Port Orford, but to direct that the "post" be "made permanent;" and if such order was intended to establish a reservation, it was void—*First*, because it did not prescribe its boundaries of limit as required by law; *second*, because it contained over 200 acres, the reservation for the purpose of a "post" being limited to 20 acres; and, *third*, it is void as to defendants' land in controversy because they were purchased before the order was made.

4. CONGRESS—POWER TO DISPOSE OF LAND—LACHES—SUIT DISMISSED.

Congress alone has the power to dispose of the public lands, and where by its authority the premises in controversy were lawfully sold to the grantees in the patents in controversy, and there is no proof that the authority conferred upon the president has been exercised, so as to take these lands out of the general provisions made by congress for their sale and disposition to private persons and uses, and where it appears that plaintiff has been guilty of laches in the assertion of its claims, the equitable defence of lapse of time is well pleaded, and, the bills being without equity, demurrer thereto is sustained and the bills dismissed.

In Equity. Suits to annul a patent.

v.12,no.5—29

Rufus Mallory, for plaintiff.

Edward W. McGraw, for defendants.

DEADY, D. J. These three suits were commenced on September 13, 1880, and heard and submitted on demurrer with the case of the *U. S. v. Tichenor*, ante, 415, and the statement and opinion in that case is largely applicable to these. They are brought to set aside and cancel four patents issued to the defendants for lands situate in Curry county, Oregon, and being parts of sections 5, 6, 7, and 8, of township 33 south, of range 15 west of the Wallamet meridian, containing in the aggregate about 255.49 acres, as follows: To Jacob B. Tichenor, two patents, each dated October 20, 1864, the one for lot numbered 3 in said section 5, and the other for lots 3 and 4 of said section 6, lot 1 of said section 7, and lot 1 of said section 8, containing altogether 74.01 acres; to Elisha H. Meservey, one patent for the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the fractional N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ west of the donation survey of William Tichenor, and the water lots 4 and 5 of said section 5, containing 165.34 acres; and to Edward W. McGraw, one patent for lots 1 and 2 of said section 6, containing 18.64 acres,—upon the ground that said patents and the entries upon which they issued were allowed and issued contrary to law and in fraud of the rights of the plaintiff, because the lands included therein were a part of a "military reservation" lawfully established at Port Orford prior thereto, all of which was known to the defendants prior to such entries.

The bills each allege the establishment of "a military reservation" at Port Orford in 1851, as in the case of William Tichenor, No. 660, except the giving of the alleged quitclaims by him and his wife, and the erection and occupation of a military post there from 1851 to 1856, and its abandonment and temporary reoccupation in 1864, and the arrest and imprisonment of said Tichenor and his son, the defendant, Jacob B. Tichenor, as in that case; and, in addition, that on March 30, 1864, the secretary of war ordered that the "post at Port Orford be made permanent according to previous action."

The allegation in regard to the reservation for light-house purposes is omitted. The description of the alleged reservation, of which only so much is given in the William Tichenor case as was necessary to locate the portion said to be within his donation, is as follows:

"Beginning at a point where the east line of Redwood street, in the town of Port Orford, in the county of Curry, Oregon, prolonged, strikes the south line of the donation land claim of William Tichenor and wife; thence along

said prolonged line and its continuation to east side of Redwood street in said town of Port Orford; thence along the south line of Third street and said line continued until it strikes the west line of said Tichenor's said claim; thence in a north-westerly direction to the sea; thence southerly following the sea to the place of beginning."

It also appears from the certified copies of said patents and the entries upon which they were issued, and also an extract from the proclamation of the president, No. 685, that on May 2, 1862, the lands in said sections 5, 6, 7, and 8, except those "appropriated by law for the use of schools, military and other purposes, or claimed under the donation laws", were proclaimed for sale at the land-office at Roseburg, Oregon, on October 13, 1862, for a period not exceeding two weeks, after which those remaining unsold were to be subject to private entry; that the lands patented to the defendants, as above stated, were purchased by them at the rate of \$1.25 per acre at said land-office, as follows: By Meservey, on September 25, 1862, upon a declaratory statement filed under the pre-emption law of May 9, 1862, and proof of compliance with said law, and the payment of \$206.67; by Jacob B. Tichenor, upon cash entries, lot 3, in section 5, on May 2, 1863, and the remainder on July 7, 1863, and the payment of \$92.52; by Edward W. McGraw, on a cash entry on July 18, 1871, and the payment of \$23.30; and that patents were issued upon these several entries, to the parties making then, as above stated.

Meservey and Tichenor answered the bills exhibited against them respectively, admitting the purchase of the lands by them as stated, and the issuing of the patents therefor, and averred that they had since sold and conveyed the same as follows: Meservey to George Dart on January 31, 1863, for the sum of \$500; Tichenor to Sarah E. Tichenor, now Sarah E. McGraw, long prior to the commencement of the suit against him for the sum of five dollars,—which deeds were duly recorded, the first-mentioned one on February 2, 1863, and the second one prior to 1870; and deny that they ever had any knowledge that said lands were ever claimed as a reservation by the United States or were not subject to private entry, and disclaim all interest in the premises since said sales and conveyances.

Thereupon the plaintiff filed an amended bill in each of these two cases, making said Dart a party defendant in Meservey's case, (No. 665,) and said Sarah E. McGraw and her husband, Edward W. McGraw, parties defendant in Jacob B. Tichenor's case, (No. 666.) To these amended bills and the original bill in Edward W. McGraw's

case (No. 664) the defendants demurred, assigning substantially the same causes of demurrer in each case as in Tichenor's case, (No. 660,) and in addition thereto that it appears from each bill :

(1) That the plaintiff surveyed the lands in question and offered them for sale at auction, and, in default of bidders, offered them to the defendant at \$1.25 an acre, who purchased them accordingly. (2) It does not appear that the defendant was guilty of any false representation or fraudulent concealment in connection with such sale. (3) It does not appear that the plaintiff has tendered to the defendant, or now offers to repay him, the money received for said lands. (4) It does not appear that the plaintiff has demanded a reconveyance of the premises.

The allegation of fraud is insufficient, and, in the nature of things, it cannot be made better. It was not the duty of the defendants to inform the officers of the United States that these lands had been lawfully reserved from sale, even if such was the case. But it was the duty of the plaintiff, through its proper officers, to know the condition of its lands in this respect, and act accordingly. Neither is the question of fraud a material one; for the plaintiff is not bound by the acts of its officers in the disposition of these lands if they acted, as is claimed, without authority of law. As to whether these lands were open to entry, the defendants took the risk,—purchased at their peril,—and if, being lawfully reserved, they were not subject to sale, the disposition of them by the officers of the land-office, being a matter beyond their jurisdiction, was void, without reference to the knowledge or motives of the defendants in making the purchase. *Wilcox v. Jackson*, 13 Pet. 511.

The only ground, then, upon which these suits can be maintained is that the lands in question had been lawfully reserved from entry by authority of the president before their sale to the defendants. If such a reservation did not exist, the lands were subject to sale, and the purchase of the defendants was lawful and valid. Therefore, the rules invoked by counsel for the defendants as applicable to a suit for the rescission of a contract within the power of the parties to make, but procured by the fraud of one of them,—as that the court will not interfere unless the parties can be placed *in statu quo*; that notice of the rescission must be given within a reasonable time, accompanied by an offer to return whatever of value has been received under the contract,—are not in point. And yet it may be that even in a case of a void contract or sale, as this is alleged to be, that the court would not annul the patent if it appeared that the vendor was negligent and the purchaser acted in good faith, without provid-

ing that the decree should not take effect until the purchase money was returned to him. But if it appeared that the purchaser had good reason to believe that the sale was not authorized by law, it would be proper to annul the patent and leave him to the mercy of congress for the purchase money.

Upon the question of whether there ever was a lawful reservation at Port Orford for any purpose, the facts in these cases are not any more favorable to the plaintiff's claim than in the Tichenor case. It does not appear that any reservation was ever made by the authority of the president. It does appear that the alleged reservation included more than 200 acres, while the law since February 14, 1853, limited the amount which might be reserved at one place for any purpose other than a "fort" to 20 acres. And while a reservation of 640 acres might lawfully have been made for a "fort," it does not appear that a "fort" was ever established at Port Orford, but only a temporary camp or unfortified post, which was abandoned as early as September, 1856, and never after actually occupied except for a very short time in 1864, for some temporary and non-military purpose.

The alleged order of the secretary of war of March 30, 1864, by which it was directed that the "*post* at Port Orford be made permanent according to previous action," is the only new fact on this point in these cases. This order implies, as the fact was, that the post had fallen into disuse; and in all probability it was procured in aid of the person who was then occupying the old buildings, nominally as agent of the government, but really for the purpose of his private trade and business, and against the will of the apparent owner,—William Tichenor,—out of which controversy grew the subsequent illegal imprisonment of the latter by the military, in the interest of this same party. But waiving this, and presuming that this order of the secretary was made by the direction of the president, what does it signify? And, *first*, it related to the "post" and not a reservation, and the object seems to have been, not to make or ratify a reservation at Port Orford, but to direct that the post be "made permanent,"—whatever that is,—a direction which seems to have been generally disregarded. The "post," as has been said, was a mere collection of log-houses in the town of Port Orford, and not upon any of these lands. But if the order was intended to establish a reservation at Port Orford, it was void, because (1) it did not prescribe its boundaries or limit the amount, as required by law; (2) if it was intended by the words "according to previous action" to have effect as a ratification of the reservation alleged to have been "mapped out" by

Wyman in 1851, it was void, because it contained over 200 acres, while a reservation for the purpose of a "post" was limited to 20 acres; and (3) it is certainly void as to the lands entered by Meservey and Tichenor,—239.35 acres, and twelve-thirteenths of the quantity in controversy,—because they were purchased before the order was made.

Congress alone has the power to dispose of the public lands, and by its authority the premises in controversy were lawfully sold to the grantees on these patents, unless before such sale they were legally designated under the authority conferred upon the president by section 14 of the donation act, and section 9 of the act amendatory thereof, (9 St. 500; 10 St. 159,) as a reservation for some of the "public uses" mentioned in said sections, and in conformity with the restrictions imposed upon said authority by said section 9.

To entitle the plaintiff to the relief sought it must prove that this authority has been exercised so as to take these lands out of the general provision made by congress for their sale and disposition to private persons and uses. Upon the facts stated, and all legal and reasonable inferences that may be drawn from them, it does not appear that there ever was a valid reservation at Port Orford, or that there ever was an attempt to designate one by the authority of the president. The plaintiff has also been guilty of laches in the assertion of these claims, and an equitable defence of lapse of time may well be allowed in these suits.

The demurrers are sustained, and the claims of the plaintiff being stale and the bills without equity they are each dismissed.

See Same parties, *ante*, 415, and note. See, also, *U. S. v. Mullan*, 10 FED. REP. 785; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 738.

JACOBSON, Receiver, etc., *v.* ALLEN, Exr., etc., and others.

(Circuit Court, S. D. New York. June 20, 1882.)

1. ACTION—AGAINST STOCKHOLDERS—RECEIVER—CAPACITY TO SUE.

Where the right of action sought to be enforced does not exist in favor of the complainant, on demurrer the bill will be held bad. So held in an action brought by the receiver of an insolvent corporation seeking to charge stockholders with a liability imposed by a section of the incorporating act.

2. STOCKHOLDERS—STATUTORY LIABILITY—DEBTS OF CORPORATION.

The liability of the stockholders of a corporation is a collateral statutory obligation for the benefit of the creditors, of which the former become sureties to the latter for the debts of the corporation.

3. SAME—COLLATERAL OBLIGATION—RIGHTS OF CREDITORS.

Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.

Howard Mansfield, for defendant.

Johnson, Cantine & Dening, E. Patterson, Martin & Smith, and Reynolds & Lowrey, for defendants.

WALLACE, C. J. Without passing upon subordinate questions raised by the demurrer, the bill must be held bad because the right of action sought to be enforced does not exist in favor of the complainant. The defendants are sued as stockholders of the bank of Chicago, an insolvent corporation of the state of Illinois, and the bill seeks to charge them with a liability imposed by one of the sections of the incorporating act, which provides that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer." The bill alleges that in a suit brought by a creditor of the bank in the superior court of Cook county, Illinois, the complainant was duly appointed by that court "receiver of all the estate, property, and equitable interests of said bank," and duly qualified and has ever since acted as such receiver. Unless the right of action to recover the statutory liability of stockholders was part of the "estate property or equitable interests" of the bank, it did not pass to the receiver under his appointment. Not only because of the allegation of the bill, but also from the inherent nature of a receiver's title, the complainant did not acquire the right to enforce the statutory liability, if it existed, only in favor of creditors of the bank and not in favor of the corporation. It is not contended that the corporation could have enforced this liability against the stockholders, but the position is taken that upon the insolvency of the corporation a fund arises by force of the statutory provision for the benefit of the creditors of the corporation, which is to be deemed part of the equitable assets of the corporation. Undoubtedly such provisions are intended to create a fund for the benefit of creditors in case of the insolvency of the corporation; but whether the creditors can resort to the fund jointly or only severally, and whether the right of the creditor is one at law or one to be enforced in equity and in subordination to the rights of the whole body of creditors, depends in each case upon the terms of the particular statute. Obviously the fund resembles an asset of the corporation more nearly when by the terms of its creation it constitutes an equitable fund for the common

benefit of all the creditors, than it does when it is secured to the creditors severally and at law.

Under this particular statute it has been determined by the courts of Illinois that a creditor of the corporation may sue individually and at law, (*McCarthy v. Lavasche*, 89 Ill. 270;) and under a similar statute it was held by the same court that the creditor's right of action was not divested by the appointment of a receiver of the corporation. *Arenz v. Weir*, 89 Ill. 25. Undoubtedly, if the liability were merely a several one in favor of the creditors, no one creditor could be divested of his right of action by any proceeding or judicial decree to which he was not a party, and therefore a receiver appointed in a suit brought by one creditor against the corporation could not acquire the rights of the other creditors. *Wincock v. Turpin*, 96 Ill. 135. It has not been definitely determined by the courts of Illinois that a suit might not be maintained in equity by all the creditors, or one in behalf of all, to recover of the stockholders when the liability is imposed in the terms employed in the present statute. If the question were to be determined irrespective of the adjudication of that state, it would hardly be deemed doubtful that the act creates a fund which may be pursued in equity for the common benefit of all the creditors. *Briggs v. Penniman*, 8 Cow. 387; *Mathez v. Neidig*, 72 N. Y. 100; *Terry v. Little*, 101 U. S. 216. Assuming that such is the character of the fund, it still remains for the complainant to maintain that it is property or assets of the corporation, and passed to him by virtue of his appointment as receiver. No case is cited to support this contention.

In *Weeks v. Love*, 50 N. Y. 571, it is said *obiter* that the stockholder's liability may be treated as corporate property. That was an action at law by a creditor against the stockholder, in which it was sought to be maintained that the creditor must resort to equity; but the action was sustained. Numerous authorities recognize the right of a receiver or assignee in bankruptcy to sue for the recovery of unpaid stock, but in these cases the corporation could have maintained the action. So, also, the right of such an officer is maintained to recover assets of the corporation which the corporation could not have recovered, because it would have been estopped from asserting its own fraudulent or illegal conduct in the disposition of the assets. These authorities fall short of the present point.

The receiver of an insolvent corporation makes his title through the corporation. He cannot through his appointment acquire that which the corporation never had. He represents the creditors of the

corporation in the administration of his trust, but his trust relates only to the corporate assets. As trustee for creditors he represents them in following the assets of the corporation, and can assert their rights in cases where the corporation could not have been heard. He is not a trustee for creditors in relation to assets which belong to them individually, or as a body. *Bristol v. Sanford*, 12 Blatchf. 341.

As is said in *Curtis v. Leavitt*, 15 N. Y. 44:

"He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders; but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title or the extent of his powers."

The liability of the stockholders to creditors may be regarded as a collateral statutory obligation of the stockholders for the benefit of the creditors, by which the former become sureties to the latter for the debts of the corporation. *Hicks v. Burns*, 38 N. H. 145. It matters not whether it is an obligation to each creditor severally or to all jointly; in either case the character of the obligation is the same. Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.

The demurrer is sustained.

NOTE. See, generally, *Shaw v. Boylan*, 16 Ind. 384; *Todhunter v. Randall*, 29 Ind. 275; *Carne v. Brigham*, 39 Me. 35; *Ochiltree v. Railroad Co.* 21 Wall. 249; *Carey v. Galli*, 94 U. S. 672, As to the rights of creditors, see *Winter v. Baker*, 34 How. Pr. 183.

MERRIAM v. LAPSLEY.

(Circuit Court, W. D. Missouri, W. D. October, 1880.)

1. CONTRACT FOR EXCHANGE OF LANDS.

Where plaintiff, one party to a contract, acts with full knowledge as to his own property, as well as the other property for which he is bargaining, while defendant, the other party, on account of non-residence, can scarcely be said to know his own property, and knows nothing whatever of the property he is trading for, the plaintiff is held to the strictest and fullest disclosures.

2. ACCEPTANCE BY LETTER—WITHDRAWAL—EQUITIES.

Where defendant signifies by letter addressed to the plaintiff his willingness to exchange property with plaintiff, and defendant, soon after mailing his letter, discovered his mistake as to the location of plaintiff's land, and wrote another letter withdrawing his proposition, but which letter did not reach plaintiff until after the latter had conditionally accepted the proposition also by letter, and who hastily and in a somewhat extraordinary manner took possession of the property of defendant, *held*, that the equity is with defendant, and judgment will be for restitution of possession of the premises, and an accounting in favor of defendant.

In Equity. Bill for specific performance.

KREKEL, D. J. This case comes here by change of venue from Cass county, Missouri; and in a controversy between Merriam, a resident of Pleasant Hill, Cass county, Missouri, and Lapsley, a resident of the state of Kentucky, plaintiff, Merriam, claims that he agreed with defendant, Lapsley, to exchange certain improved real estate in Pleasant Hill, Cass county, Missouri, owned by defendant, for improved real estate in the state of Kansas, owned by Merriam. The transaction commenced by Merriam writing to Lapsley, offering to exchange his Kansas lands for Lapsley's Pleasant Hill house and lot. A correspondence is thereupon had, and it is claimed by Merriam in his bill that an agreement was reached under which he took, and now holds, possession of the Pleasant Hill property. All the information Lapsley ever had regarding the Kansas lands of Merriam came from Merriam through letters in evidence. It seems that Lapsley, under an erroneous impression regarding the location of the land as to railroad improvements, expressed himself at one time willing to exchange, and so wrote Merriam, but soon after writing and mailing his letter discovered his mistake, and wrote withdrawing his proposition. This letter of withdrawal did not reach Merriam until after he, as he claims, had accepted Lapsley's proposition, and so advised Lapsley by letter. Had this letter of acceptance on part of Merriam been unconditional, the case, under all the evidence and the law as found in the adjudicated cases, would have been in favor of plaintiff. But the letter of acceptance is not an unconditional one, but in it occurs the following language:

"I have some rails or posts, or both, which Mr. Sutton [the agent of Merriam] wrote me about selling, which I think were near the stable, which I reserve. He also wrote me there were a good many peach trees that would be wanted this spring, and I told him to sell them, where they were too thick, for two cents apiece, and have them thinned out, but, of course, if any trees sold after this time, the sale will belong to you."

Thus it appears that Merriam, not only makes reservations not mentioned in any of his former correspondence spoken of, but seems not to have known even himself what had been done under his instructions regarding the sale of peach trees, a matter which Lapsley was entitled to know in order to determine for himself whether he would take the land after he had been advised of the condition of things. These may appear slight deviations or conditions, but are proper to be seized upon by the chancellor to prevent injustice. The whole case, under the evidence, presents one in which one party acts with full knowledge as to his own property as well as the other property for which he is bargaining, while the other, on account of non-residence, can scarcely be said to know his own property, and who knew nothing whatever of the property he was trading for. Under such circumstances Merriam is held to the strictest and fullest disclosures. While it cannot be said that plaintiff made direct misrepresentations, (for the value put upon his Kansas land, and the value thereof testified to by others, may be said to be within the range of allowance by one who estimates the value of his property in a trade,) yet the description of the land, and especially of the improvements, when examined under the testimony in the case, is well calculated to impress the mind more favorably than the facts testified to would do. The hasty and somewhat extraordinary manner in which plaintiff took possession of the property of defendant, without awaiting a reply to his conditional letter of acceptance, is well calculated to leave the impression that he largely relied on getting hold of the property in overcoming any obstacles to the consummation of the trade which might be imposed, thus anticipating, as it were, what has occurred. On the whole, I am well satisfied that the equity is with defendant, and the judgment of the court will be that plaintiff deliver up the possession of the premises to Lapsley on or before the first of June next; that an account of the rents, repairs, and payment of taxes be taken, so that judgment may be rendered in this regard for a specific and proper amount.

BROWNING and others v. PORTER and others.

(Circuit Court, E. D. Missouri. January, 1881.)

1. INJUNCTION BOND—WHAT NOT COVERED BY.

An injunction bond conditioned to "abide the decision which shall be made thereon, [the original suit,] and pay all sums of money, damages, and costs that shall be adjudged against them if said injunction shall be dissolved," does not cover the amount of the original judgment and its costs, nor the attorney's fees.

2. DISSOLUTION OF INJUNCTION—REMEDY ON THE BOND.

Whether a court of chancery in dissolving an injunction will itself proceed to assess damages resulting therefrom, or drive the defendant to an action at law on the bond, not decided.

In Equity.

John H. Overall, for the motion.

Edward McCabe, *contra*.

TREAT, D. J. A suit in equity was instituted by plaintiffs, and on their motion a provisional injunction issued to restrain proceedings at law on a judgment in a state court.

An injunction bond was given as required, with sureties conditioned to "abide the decision which shall be made thereon, [the original suit,] and pay all sums of money, damages, and costs that shall be adjudged against them, if said injunction shall be dissolved." Said injunction was dissolved and the bill dismissed.

A motion is now made for the assessment of damages, to-wit: the amount of the judgment in the state court, \$619; costs in state court, \$25; attorney's fee in injunction suit, \$200.

It is clear that the bond did not cover the amount of the original judgment and its costs, nor the attorney's fee. *Bein v. Heath*, 12 How. 176; *Oelrichs v. Spain*, 15 Wall. 230. To the same effect are the Missouri cases cited.

Another question was suggested in the light of the authorities produced, viz.: whether a court of chancery, in dissolving an injunction, would itself proceed to assess damages resulting therefrom, or drive the defendant to an action at law on the injunction bond.

The motion before the court does not call for a decision on that point, although nothing is seen in the cases cited to deprive the chancery court of its power to finally determine the controversies between the parties before it.

The case of *Bein v. Heath* was an action on an injunction bond, and the *dicta* in the opinion are very strong. In that case the court

says: 'A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction.'

Is that *dictum* to be received as a general rule, or limited to cases like that then under consideration? It sometimes happens that injunction bonds are conditioned to pay *damages* which the court may assess, and hence, unless the court assesses damages, no cause of action arises on the bond. It may be that the provisional injunction is dissolved on motion, before final hearing and decree on the merits, and that on final hearing the decree is for plaintiff, or for defendant, thus varying the matter of costs and damages. That final decree would be operative in a suit on the injunction bond, so far as its tenor required; and such a decree would, in many cases, be necessary to hold the parties to the bond.

It is obvious that the several cases on such bonds must depend on the conditions stated; some requiring the antecedent action of the chancery court, and some requiring no such action.

It is well settled that proceedings of United States courts in equity are not affected by local statutes; and it is supposed to be equally well settled that chancery courts, having obtained jurisdiction of the parties and the controversy, will retain jurisdiction for the final settlement of the whole subject-matter, so as to avoid multiplicity of suits, including all incidents of the litigation.

Whatever the true rule may be in that respect, the motion in this case asks for what could not be allowed, either at law or equity.

Motion overruled.

Ex parte PETERS.

(Circuit Court, W. D. Missouri. April, 1880.)

1. INDICTMENT—SEPARATE OFFENCES—DISTINCT COUNTS.

Separate offences of the same class and growing out of the same transactions may be joined in one indictment in separate counts, provided they are such as may be "properly joined."

2. BURGLARY—LARCENY FROM HOUSE—DISTINCT OFFENCES.

A person who breaks into a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offences or one, at the election of the power prosecuting him.

3. SAME—HABEAS CORPUS—RELEASE DENIED.

A person sentenced under such an indictment cannot be released on *habeas corpus* on the ground that distinct offences were improperly joined.

Habeas Corpus. Petition for release.

McCARY, C. J. Petitioner was indicted in the United States district court for this district. The indictment contained four counts.

The first count charged the petitioner with burglary in breaking and entering the building used as a post-office at Bucklin, Linn county, Missouri, with intent to commit a larceny, on the twenty-eighth of October, 1874.

The second count charged him with larceny committed at the same time and place by stealing from said post-office a letter containing \$307.50.

The third count charged him with burglary in breaking and entering the building used as a post-office at Unionville, Putnam county, Missouri, with intent to commit larceny, on the twelfth day of November, 1874.

The fourth count charged him with larceny at the same time and place named in the third, by stealing from said post-office two letters, one containing the sum of \$146.30 in money.

There was a plea of guilty upon all the counts, and the petitioner was sentenced to be imprisoned in the penitentiary of Missouri for the term of two years under each of the four counts, the first term to commence on the eighth of March, 1875; the second to commence on the expiration of the first term of two years; the third term to commence on the expiration of the second term of two years; and the fourth term to commence on the expiration of the third term of two years, and said four terms to constitute a continuous imprisonment of eight years.

On the eighteenth of April, 1877, petitioner applied to this court for release, on the ground that his imprisonment was illegal, and upon full consideration it was then determined that his sentence was valid at least for two terms of two years each, the court being of the opinion that at least two distinct offences were charged, one in the first and one in the third count, and that after conviction, by force of section 1024, Rev. St., these two offences must be treated *in this proceeding* as having been "properly joined."

The question as to the validity of the remainder of the sentence was expressly reserved until it should be presented after the expiration of four years of imprisonment. See 4 Dill. 169.

The two terms of two years each having expired, the petitioner now renews his application for discharge, and we are called upon to determine whether the sentence as to the remaining four years is valid.

The ground of the petitioner's application for discharge is thus stated in his petition now before us :

"And your petitioner alleges that his present imprisonment is illegal, and that he is entitled to be discharged therefrom in this: that he has fully served out the terms of imprisonment imposed upon him for the two burglaries charged in the indictment, and that the other two sentences of two years each were imposed for two separate larcenies, each of which is charged in said indictment to have been committed at the same time and place, and as part and parcel of a burglary whereof this petitioner was duly convicted and sentenced; and your petitioner avers the said sentences to be illegal in this: that the district court had no legal power to sentence this petitioner to imprisonment for a larceny charged to have been committed at the same time and place, and as part of the same act of burglary whereof he was convicted and sentenced."

1. There is no statute of the United States affecting this question, and we are, therefore, to adopt and follow the rule of the common law. *Conk. Treat. (5th Ed.)* 181.

2. The question tersely stated is whether it was competent for the district court to sentence the petitioner for both burglary and larceny charged in separate counts, but both appearing to be part of the same act.

Section 1024 of the Revised Statutes is as follows :

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them consolidated."

The effect of this statute is to permit separate offences of the same class and growing out of the same transactions to be joined in one indictment in separate counts, provided they be such as may "be properly joined." It makes no change in the law as it previously existed, except to permit offences which might have been theretofore presented in separate indictments to be presented in separate counts of the same indictment. It leaves entirely open the question whether burglary and larceny, growing out of the same transaction, are such distinct offences as to be properly joined in the same indictment and separately punished.

According to the great weight of authority, it may be regarded as settled that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offences, or one, at the election of the power prosecuting him. 1 *Bish. Crim. Law*, § 1062, and cases cited.

The case of *Josslyn v. Com.* 6 Metc. 236, is directly in point. See, also, *State v. Ridley*, 48 Iowa, 370, and *Breese v. State*, 12 Ohio St. 146.

The opposite view was ably stated by *Waite*, C. J., in his dissenting opinion in *Wilson v. State*, 24 Conn. 57, and his reasoning is so strong that if it were a question of first impression, I should be inclined to adopt his opinion. Looking, however, to the adjudicated cases, I find the law to be very well settled against the position assumed by the counsel for petitioner. I am the more inclined to follow these adjudications in this case because the punishment inflicted might, under the two counts admittedly good, have extended to 10 years' imprisonment. Rev. St. §§ 5469, 5478.

The prayer of the petitioner is denied.

KREKEL, D. J., concurs.

INDICTMENT—DISTINCT OFFENCES. At common law and under section 1024, Rev. St., distinct offences may be joined in the indictment, (*U. S. v. Nye*, 4 FED. REP. 888; *U. S. v. Callahan*, 6 McLean, 96; *U. S. v. Jacoby*, 12 Blatchf. 491;) but they must be of the same class of crime, (*U. S. v. Bennett*, 17 Blatchf. 357;) and may be distinct offences (*Case of Lange*, 13 Blatchf. 548) arising out of the same transaction, (*U. S. v. Jacoby*, 12 Blatchf. 492;) but a count for conspiracy cannot be joined with a count for murder. *U. S. v. Scott*, 4 Biss. 29. Different counts are allowable only on the presumption that they are different offences, and every count so imports on the face of the declaration. *U. S. v. Malone*, 9 FED. REP. 900. When separate offences are consolidated into one indictment, with separate counts, a general verdict is proper, and will be sustained, if any of the counts are good, and charge an offence. *U. S. v. Stone*, 8 FED. REP. 252; *U. S. v. Wentworth*, 11 FED. REP. 52. See *U. S. v. Patterson*, 6 McLean, 466; *U. S. v. Peterson*, 1 Wood. & M. 305; *U. S. v. Seagrist*, 4 Blatchf. 420; *State v. Collicutt*, 1 Lea. 714. Two indictments for inveiglement and kidnapping were found against defendant, with the same charges, except as against different persons, and were consolidated under this section. *U. S. v. Anacrola*, 1 FED. REP. 677; *U. S. v. Stone*, 8 FED. REP. 252.

STEALING FROM THE MAIL. Stealing from the mail is not an infamous crime, and may be prosecuted by information. *U. S. v. Wynn*, 9 FED. REP. 886. The offence defined in the statute is committed by secreting, embezzling, or destroying any letter before it is delivered to the person to whom it is directed. *U. S. v. Parsons*, 2 Blatchf. 105. And it is not necessary that the name to which a letter is directed should be the true name of the person for whom it is intended. *U. S. v. Pond*, 2 Curt. 265. So a decoy letter is within the statute. *U. S. v. Cottingham*, 2 Blatchf. 470; *U. S. v. Foye*, 1 Curt. 364. And the offence is committed although there be no article of value in the letter. *U. S. v. Fisher*, 5 McLean, 23. The stealing is a clandestine taking—not a taking through mistake, or with an innocent intent; the intent must be criminal. *U. S. v. Pearce*, 2 McLean, 14. Where a letter is delivered to an authorized agent it cannot be said to be embezzled, and the question of agency

is one of fact for the jury. *U. S. v. Sander*, 6 McLean, 598. So an errand-boy cannot be convicted under this section. *U. S. v. Driscoll*, 1 Low. 303. The statute does not look beyond a possession obtained wrongfully from the post-office or from a mail carrier. *U. S. v. Parsons*, 2 Blatchf. 105. So, if a person takes a letter from and out of that part of the post-office building appropriated to the disposal of such letter, he is guilty of stealing the letter from and out of the post-office, although he does not remove it out of the building. *U. S. v. Marselis*, 2 Blatchf. 109. After the voluntary termination of the custody of the letter by the post-office or its agents, the rights of the real proprietor are under the guardianship of the local law, and not of the United States. *U. S. v. Parsons*, 2 Blatchf. 105. But see *U. S. v. McCreedy*, 11 FED. REP. 225, where it decides that "the act of congress was designed to protect letters sent by mail from embezzlement until they reach their destination, by actual delivery to the person entitled to receive them."—[ED.]

LUEDERS' EX'R v. HARTFORD LIFE & ANNUITY INS. CO.*

(Circuit Court, E. D. Missouri. May 5, 1882.)

1. INSURANCE—APPLICANT MUST ACT IN GOOD FAITH.

A party applying for insurance is bound to answer questions concerning facts material to the risk, truthfully.

2. SAME—APPLICATION—RULE WHEN AGENT INSERTS FALSE STATEMENTS.

Where an authorized agent of an insurance company has examined an applicant for insurance upon questions contained in a blank application, and undertakes to fill in the applicant's answer, the applicant has a right to presume that his answers have been written down as given; and if he has answered all questions truly, and signs the application under the impression that his answers have been correctly reduced to writing, a policy issued on the faith of the application will not be invalidated by false answers inserted in the application by the company's agent without the applicant's knowledge, even where the application is made a part of the policy and contains a declaration that the answers contained therein "are full, complete, and true; and it is agreed that this declaration and warranty shall form the basis of the contract between the undersigned" and the company.

3. SAME—EVIDENCE.

In such cases oral evidence is admissible to prove that the questions contained in the application were answered truly by the applicant.

4. SAME—JUDGMENTS.

Where a mutual life insurance company issued five certificates of membership in its safety-fund department to an applicant for insurance, in each of which it agreed in case of the assured's death to make an assessment "upon the holders of certificates in force in said department at the date of such death according to the table of graduated assessment rates given herein, as determined by their respective ages and the number of such certificates in force at

*Reported by B. F. Rex, Esq., of the St. Louis bar.

the date of such death, and the sum collected thereon (less 10 cents per member for costs of collection) shall be paid: provided, however, that in no case shall the payment upon this certificate, in the event of such death, exceed \$1,000, less \$15 as a *post mortem* contribution to said safety fund:" *held*, that upon the assured's death his legal representative was entitled to judgment against said company for the maximum amount named in said certificate.

This was a suit by the executor of J. H. Lueders upon five certificates of insurance, in the sum of \$1,000 each, issued by the Hartford Life & Annuity Insurance Company upon the life of said Lueders. The petition declared the certificates as simple contracts of insurance, and asked judgment upon each certificate for the maximum amount named therein. The defendant answered that said certificates were null and void because of certain concealments on the assured's part, and because the answers contained in his application in reference to his health were false. And the answer set up a provision of the certificates sued on by which it was provided that if there should be any concealment, misrepresentations, or false statements made in the application on which said certificates issued, said certificates should be null and void. Plaintiff in reply denied the allegations of the answer, and alleged that the assured had concealed nothing and made no false representation, but had, in reply to questions contained in the application, stated the truth to the defendant's agent who took his application; that the answers contained in said application had been written therein by defendant's agent; and that if false answers had been inserted it was without the applicant's knowledge. The application upon which the certificates sued on were issued contained, among others, the following questions and answers:

"(12) Do you now possess a sound constitution and good health? Yes."

"(19) How long is it since you were attended by a physician, or have professionally consulted one? About six weeks ago. For what disease? Liver complaint. Have you fully recovered therefrom? Yes."

The following declaration was appended to the application:

"It is hereby declared and warranted that the foregoing answers and statements are full, complete, and true; and it is agreed that this declaration and warranty shall form the basis of the contract between the undersigned and the Hartford Life & Annuity Insurance Company, and are offered to said company as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on the application," etc.

The application was signed by the applicant.

The certificates sued on each contained the following clauses:

"In consideration of the representations, agreements, and warranties made in the application herofor, and of the admission fee paid, and of the sum of \$10 to be paid to said company, to create a safety fund as hereinafter described, and of 25 cents to be paid monthly for expenses, and of the further payment, in accordance with the conditions hereof, of all mortuary assessments, does hereby issue this certificate of membership in its safety-fund department to J. H. Lueders, of St. Louis, county of St. Louis, state of Missouri, with the following agreements:

"That said company will deposit said sum of \$10, when received, with the trustee named in a contract made with it, (of which a copy is printed herein,) as a safety fund, in trust for the uses and purposes expressed in said contract, and shall at the expiration of five years from July 1, 1879, if said safety fund shall then amount to \$300,000, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, *pro rata*, among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date of any such division, their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments. * * *

"Said company further agrees that if at any time after said fund shall have amounted to \$300,000, or after five years from January 1, 1880, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said trustees by the legal holder thereof, accompanied by satisfactory evidence as hereinafter provided of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said trustee to at once convert said safety fund into money, and divide the same (less the reasonable charges and expenses for the management and control of said fund) among all the holders of certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force; and that in such event it shall file with said trustee a correct list under oath of the names, residences, and amounts of the certificates of all members entitled to participate in such division. * * *

"The evidence referred to above to be either certification of said insurance company's president or secretary that a claim is justly and legally due, and that payment thereof has been demanded and refused, or the duly-attested copy of a final judgment obtained thereon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of 60 days from date. * * *

"Upon the death of the member aforesaid while this certificate is in force, all the conditions hereof having been conformed to by said member, and on the receipt by the president or secretary of said company of satisfactory proofs of such death, an assessment shall be made upon the holder of all certificates in force in said department at the date of such death, according to the table of graduated assessment rates given herein, as determined by their respective ages, and the number of such certificates in force at the date of

such death, and the sum collected thereon, (less 10 cents per member for costs of collection,) shall be paid: provided, however, that in no case shall the payment upon this certificate in the event of such death exceed \$1,000, (less \$15 as a *post mortem* contribution to said safety fund.) * * *

"The application on the faith of which this certificate issued is hereby referred to and made a part of this contract."

The case came up for trial April 11, 1882, and was tried before a jury.

The plaintiff introduced the certificates sued on in evidence. Defendant introduced the application, and evidence tending to prove that the assured had liver complaint at the time he made the application and knew it. Plaintiff offered oral evidence in rebuttal tending to prove that the assured had told the examining physician of the defendant, when his application was taken, that he had liver complaint; that said physician had examined assured and had himself inserted the answers contained in the application; and that the assured had signed the application supposing it contained the answers given by him. Defendant objected that the only admissible evidence as to what answers had been given to the questions contained in the application was the application itself; but the objection was overruled.

George M. Stewart and Paul Bakewell, for plaintiff.

Frank K. Ryan, for defendant.

TREAT, D. J., (*charging jury orally*.) This case differs in some respects from the cases ordinarily submitted to juries concerning life-insurance policies. If you should find for the plaintiff, as there are five of these so-called certificates or policies, you will necessarily find for her in the sum of \$5,000, with interest at the rate of 6 per cent. per annum from December 15, 1881; that is, 90 days after the proof of death.

Now, shall the plaintiff recover? The primary contest is that the deceased made a false statement concerning a disease which he then had and which contributed to his death, to-wit, the so-called liver complaint. The answer to the question, as recorded in the application, is: "Had liver complaint six weeks ago; am well now." If he had not recovered from the liver complaint, and if he actually made that answer, and died of that disease within the short period named, the plaintiff here has no right to recover; in other words, your verdict should be for the defendant. But did he make such an answer? And there the strain of the case comes. You have heard the testimony of the widow, and of the doctor who examined Mr. Lueders. When questioned by the medical examiner of this com-

pany concerning this supposed liver complaint, if he did make the answers as stated by Mr. Wagner and by the doctor, and they were written down in pencil on this paper, and the paper was put across the table for him to sign, and he signed it under the hurry and circumstances developed before you, he had a right to suppose that his answers were recorded as he gave them. If that statement is correct, then this paper is a subterfuge, because he did not tell them what is written down there, but told them that he not only had liver complaint and enlargement of the liver, but that he believed he still had it, and told them who his doctor was that treated him for it; and if this medical examiner of the company wrote down merely his own conclusions with regard to it, and not the answers of the applicant, then the plaintiff is not bound by this application. In other words, every one is bound in these matters, whether the company be a mutual or any other sort of company, to deal truthfully and honestly with the company, because on the faith of the statement of the applicant the company must determine whether it will assume the risk; therefore if the applicant, with regard to any of the questions which are material to the risk, answers falsely, there can be no recovery on the policy. That principle, as a matter of common honesty, ought to obtain with regard to all transactions between man and man.

I presume it will hardly be questioned by you, in the light of the testimony, that the deceased died of the disease called *cirrhosis* of the liver, or, in ordinary language, liver complaint. When he underwent examination and was called upon to answer questions, what did he answer? Did he answer that he had liver complaint merely and was now well? Or did he answer that he had enlargement of the liver? Do you believe that he gave this answer and saw the medical examiner write it down, or is it the conclusion of the medical examiner not only from the statements made by the party applying for the insurance, but also from the result of his own medical investigation? If the answers are not written down as the applicant gave them he is not responsible for what anybody else wrote. He had a right to suppose, in common honesty, that when he signed the paper which was written in pencil his answers were correctly recorded, more especially when an officer of the company was recording them. If the officer of the company wrote down, not the answers made by the applicant, but his conclusions gathered from the statements of the applicant and his reference to his medical attendant, Dr. Holland, and also from

his own examination, and these are answers that the applicant never made, he is not bound by them.

So that, to sum it up in a few words, if the deceased made a false statement in regard to a matter which is material to the risk, to-wit, concerning this liver complaint, from which he died, there can be no recovery by the plaintiff; but if, on the other hand, despite his signature to this paper, which seems originally to have been written in pencil, even supposing it was correctly transcribed into ink afterwards, these are not the answers the applicant made to the questions, but what the doctor chose to write down as his conclusions from the answers made to the questions and his examination, then the plaintiff is entitled to recover. In other words, the applicant is only bound by the answers he makes, and is not bound by the conclusions of the examining doctor from the statements of the applicant, or by the opinion of the doctor with regard to them. You understand me, gentlemen, in regard to it. You have heard the testimony of two witnesses as to what occurred at the time the application was signed, the questions that were put, the circumstances under which they were put, how they were noted down, and who noted them down. They were not written in the handwriting of the deceased. They were written by the medical examiner of the company under the circumstances which he has disclosed. Now, these answers, in the light of the testimony of the widow of the deceased, would appear to be (and that is for you to decide) rather the result of an opinion formed by the medical examiner as to what ought to be the answers, and not what the answers really were. In other words, if, as the doctor testifies, the answer was, "I have had an enlargement of the liver," and went through the process of disrobing in order that the doctor might determine the matter, and the doctor, reaching his conclusions, chose to write down this answer without the knowledge of the deceased, it is not the answer of the deceased, and he is not responsible therefor.

The defendant excepted to the giving of the following portion of said charge, to-wit:

"Now, shall the plaintiff recover? The primary contest is that the deceased made a false statement concerning a disease which he then had, and which contributed to his death, to-wit, his so-called liver complaint. The answer to this question, as recorded in the application, is: 'Had liver complaint six weeks ago; am well now.' If he had not recovered from the liver complaint,

and if he actually made that answer and died of that disease within the short period named, the plaintiff here has no right to recover. * * *

"So that, to sum it all up in a few words, if the deceased made a false statement in regard to a matter which is material to the risk, to-wit, concerning the liver complaint from which he died, there can be no recovery by the plaintiff. * * *

"Therefore, if the applicant, with regard to any of the questionous which are material to the risk, answered falsely, there can be no recovery on the policy."

Under the instructions of the court the jury found for the plaintiff.

The judgment, after reciting the verdict, etc., proceeds:

"It is therefore considered by the court that the plaintiff, Caroline Lueders, executrix under the will of J. H. Lueders, deceased, have and recover of the defendant, the Hartford Life & Annuity Insurance Company, of Hartford, Connecticut, as well the said sum of \$5,096.66, (five thousand and ninety-six dollars and sixty-six cents,) the damages as aforesaid by the jury assessed, as also the costs herein expended, and that execution issue therefor."

The defendant moved the court to set aside the verdict and judgment entered in the cause for the following reasons:

"(1) The verdict of the jury is against the evidence presented at the trial. (2) The verdict was against the weight of the evidence. (3) The verdict is against the law as declared in the charge by the court to the jury. (4) Because the court erred in refusing to charge the jury as asked for in the instructions offered by the defendant. (5) That the court erred by its charge to the jury in submitting to said jury the materiality of the alleged warranties and misrepresentations of J. H. Lueders contained in his application for insurance."

The following opinion was delivered upon the motion:

TREAT, D. J. Under the insurance statutes of Missouri the defendant established an agency in this state, subject, of course, to the provisions of said statutes. It is contended that the contract sued on does not permit recovery of any sum, when loss occurs, except to the extent of assessments to be made upon the number of issued certificates; consequently the plaintiff must aver and prove the number of such outstanding certificates, the judgment to be limited thereby, notwithstanding the amount insured. The case referred to in Connecticut reports (*Curtis v. Mutual Benefit Life Ins. Co.* 1880) goes very far in that direction; indeed, is directly in point.

It is not proposed to analyze the various cases in England and the United States which seemingly bear on like policies. The contract

sued on is somewhat anomalous. It is presumed that it contemplated some available measure of indemnity. When a loss occurs under it, and satisfactory proofs thereof are made to the president and secretary, their duty to make the required assessment ensues, according to its express terms. If they fail to perform such duty shall the other party be remediless? As to what legal proceedings might then prevail it is not necessary now to discuss. This suit is to establish plaintiff's rights in a case where the company denies that he has any rights whatever. The contract contemplates on its face that final judgment may have to be made; and whether it did or not, the parties aggrieved would have their legal remedy in the proper courts.

It is necessary for the plaintiff to prove a valid loss, the amount to be recovered therefrom after judgment being dependent, possibly, on subsequent events, viz., how much may be collected on the required assessments. Shall the suit at law be based, as to damages, on the number of outstanding certificates, irrespective of what may be collected from assessments thereon within 90 days? Enough appears to show that more than 22,000 certificates of the class named have been issued—scattered, it may be, over many states. It is best known to the company who and where are the certificate-holders, and, if plaintiff's rights to a judgment on a disputed loss are to be limited by the number, etc., of outstanding certificates, it would seem that defendant should set up the limit as to the number, etc., lapsed or otherwise.

There are many strange provisions in the contract. It is made by a corporation which, it is contended, has subdivided itself into departments for the conduct of distinct branches of business, on some of which it is directly and positively liable, and on others only contingently liable, and on others liable, as in this case, only in such a way as to become a mere agent to collect from its policy-holders what assessments they may be liable to for losses occurring. Possibly such may be the true construction of its differing contracts and of its corporate obligations; but this court is not prepared so to hold. There must be some one answerable at law for the contracts it makes, and judgments on such contracts must be against the corporation; but why, if merely an agent? In the absence of any proof to the contrary, the sum recoverable should be against the corporation for the maximum insured. Any other rule would make this insurance scheme a mere delusion and snare.

It may often happen that the corporation disputes all liability, and hence refuses to make any assessment, as in this case. When such a dispute is submitted to a court of law, and the judgment is against the corporation, who shall respond to that judgment? If the loss had been admitted originally, and assessment made on the certificate-holders, and the amount collected paid over within 90 days, as the contract contemplates, no great difficulty might have occurred. Surely the commencement of this suit did not so fix the obligation of other certificate-holders as if, by a lien, that they, and they alone, would be answerable, and only for the result of this judgment. The scheme, if it be as contended, is vague and indeterminate—*First*, as to the amount of loss recoverable; and, *second*, in the event of litigation, against whom and to what extent judgment shall be enforced. If judgment is to be against the corporation, for what amount shall it be rendered, and how shall the amount be ascertained? If the assessment is to be made only on certificate-holders existing at the time of loss happening, how is it as to those who fail to pay? Who shall collect from the delinquents, and when? What becomes of a judgment for a certain amount? If the judgment has to be for an amount equal to the number of certificate-holders, how about payment within 90 days, when assessments are to be collected equally and solely from certificate-holders scattered all over the country?

If the defendant's theory as to the true construction of the contract, when the corporation compels a suit, is to obtain, then a policy like the present is of little worth. True, if a person, *sui juris*, chooses to make a foolish contract, he must abide by its terms; but should not the contract be so construed as to make its contemplated benefits available?

Despite some decisions to the contrary, this court cannot hold otherwise than that when suit has to be brought the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced. Even then the strange result would follow that as to each outstanding certificate-holder and his responsibility a controversy might arise. The further the inquiry is pursued, the greater the legal difficulties presented.

The motion for new trial must be overruled.

MOHR & MOHR DISTILLING Co. v. INSURANCE COS.*

(Circuit Court, S. D. Ohio, W. D. June, 1882.)

1. ACTIONS UPON INSURANCE POLICIES TRANSITORY, NOT LOCAL.

An action upon a policy of insurance is transitory, not local, and may, therefore, be brought wherever the company issuing the policy can be found, without regard to where the contract of insurance was made, or the subject thereof was located.

2. ACTIONS AGAINST FOREIGN CORPORATIONS IN UNITED STATES COURTS—SERVICE OF PROCESS UPON AGENTS.

Where foreign corporations establish agencies in a state whose laws provide that they may be summoned by process served upon such agents, they are "found" within the district in which such agent is doing business, in the meaning of the act of congress of March 3, 1875, (18 St. at Large, 470,) and may be served in the same manner in suits brought in the courts of the United States.

3. FOREIGN INSURANCE COMPANIES IN OHIO—CONSENT TO BE SUED.

Semble, that the consent to be sued through certain agencies, required before foreign insurance companies are allowed to transact business in Ohio, is not limited simply to causes of action arising within the state, but extends to all transitory actions.

Moulton, Johnson & Levy and W. H. Jones, for plaintiff.

Follett, Hyman & Dawson and Gary, Cody & Gary, for defendant.

MATTHEWS, Justice, (*orally*.) In each of these cases the plaintiff is a citizen of Indiana, and the defendants are corporations in states other than Ohio, but each of which is licensed under the laws of Ohio to transact insurance business within this state, having agents appointed for that purpose, and actually transacting business in this state. The causes of action are upon policies of fire insurance issued by these companies, the subject of the insurance being property in the state of Indiana. The defendants have been sued here, and process has been served upon their agents. Motions were made heretofore to set aside that service, on the ground that this court did not have jurisdiction of the several causes of action, or over the persons of these defendants. The court, of course, has jurisdiction of the subject-matter in case the parties are right. The controversies are between citizens of different states, so that, in that respect, the court has jurisdiction, and the question then is reduced to one of jurisdiction over the persons. It is conceded that these actions might be maintained in the state courts of Ohio, notwithstanding the policies may not have been issued by the agencies in this state, and although the subject of the insurance is not in this state.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

Mr. Hyman. That is not conceded, your honor.

Matthews, J. I assume it, then; because I think it is clear that these actions might be brought in the state courts, notwithstanding the fact that the policies of insurance may have been issued by the companies through agencies not in this state, and although the subject of the insurance is not in this state.

The action of *assumpsit* or covenant (as might have been brought in these cases) upon a policy of insurance is not local but transitory, and may be brought wherever the defendant is found; and, under the general provision of the Code of Procedure in this state, I assume it to be indisputable that an action might be maintained. It might be maintained in either of two forms; that is, in either of two modes of procedure. If there had been found property of the company, the process might have been by a foreign attachment, and if so, personal service need not have been had, and the judgment would have only gone to the extent of the property found, which might be subjected to the payment of it. Or if the corporation had a managing agent, (as described in the Code of Procedure of this state,) upon whom service could be made, it might have been brought in personally and made to answer to a personal judgment, and that judgment would have been conclusive between these parties in any other forum.

Now, of course, an action cannot be commenced in this court against a defendant by attachment. It must be by a personal service, because the act of congress provides that the action shall be brought in the district *where the defendant is an inhabitant, or in which he may be found*, and the question is whether, under the circumstances of this case, these defendants have been found in this district.

The statutes of Ohio have provided, as I have already indicated, the mode by which foreign corporations transacting business in this state, and represented by agents in this state, may be summoned to answer any cause of action transitory in its nature.

The insurance law itself requires that they should expressly assent to its terms and consent to be sued through certain agencies before they are allowed to transact business in this state.

The defence is that that consent only goes to the extent of the terms of that statute, and is reasonably construed to cover only the transactions arising under it. But, even if that were so, I should still think that under the other general provisions of the statute making provision for service of process upon managing agents of foreign corporations, their coming into the state by means of such agents for the purpose of transacting business was necessarily an assent to

being sued in that way, and constituted them personally within the district, in such a sense as that they may be said to be found by process when issued against them and served on these agents.

I think this is a necessary result of the application of the doctrine contained in the case of *Railroad Co. v. Harris*, decided by the supreme court, in 12 Wall. 65, and I do not see that it is possible to distinguish these cases from the case of *Ex parte Schollenberger*, 96 U. S. 369; although in that case the cause of action was one which arose under the operation of a law which authorized the companies to transact business in the state of Pennsylvania.

The only distinction, then, between the two cases is that here the causes of action were not created by the action of the agents of the corporations in this state. But, by virtue of the general provisions of the statute relating to service on foreign corporations, even on the supposition that I am not authorized to construe the insurance law itself as requiring them to assent to be sued with reference to all causes of action,—and I do not think it can be limited,—I have thought this service was rightly had. The motions are granted vacating the former orders setting aside the service in these cases, and the cases are reinstated.

NOTE.

The act of March 3, 1875, (1 Rev. St. Supp. p. 470, c. 137, § 1.) adopts the phraseology of the constitution, and enlarges the jurisdiction of the circuit court to the full extent of the powers of congress over the subject, and repeals the previous limitation requiring one of the parties to be a citizen of the state where the suit is brought. *Eureka Mining Co. v. Richmond Mining Co.* 2 FED. REP. 829; Dillon, Removals, (3d Ed.) pp. 26, 27; *Peterson v. Chapman*, 13 Blatchf. 395; *Brooks v. Bailey*, 9 FED. REP. 438; *Cooke v. Ford*, 16 Am. L. Reg. 417; *Taylor v. Rockefeller*, 18 Am. L. Reg. 306, and note, p. 310; *Sheldon v. Keokuk Packet Co.* 1 FED. REP. 792; *Osgood v. Chicago, etc., R. Co.* 7 Chi. Leg. N. 241; *Mayo v. Taylor*, 8 Chi. Leg. N. 11; *Clippinger v. Missouri Valley L. Ins. Co.* Id. 156; *Seckler v. Buckhaus*, 9 Chi. Leg. N. 161.

Section 739, Rev. St., provides that defendant can be sued only in the district where he resides or *may be found*. But corporations may be found for service of process wherever they are doing business. *Wilson Packing Co. v. Hunter*, 8 Cent. Law J. 333; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Moulin v. Ins. Co.* 1 Dutch. 57; *Moch v. Ins. Co.* 10 FED. REP. 690; *Wheeling, etc., Transp. Co. v. B. & O. R. Co.* 1 Cin. Sup. Ct. Rep. 311; *Hannibal, etc., R. Co. v. Crane*, 102 Ill. 249; *Handy v. Aetna Ins. Co.* 37 Ohio St.—, (2 Ohio Law J. 289;) *McNichol v. U. S. Mercantile Ass'n*, 14 Cent. Law J. 51; *Williams v. Empire Transp. Co.* 14 O. G. 523.

The questions are believed to be of sufficient importance to warrant inserting here the able opinion of Judge Manning F. Force rendered in *Mohr & Mohr Distilling Co. v. Lamar Ins. Co.*, pending in the superior court of Cin-

cinnati, being one of the same series of cases as that decided by Mr. Justice Matthews. It arose upon a motion to set aside service of summons, and is as follows:

"FORCE, J. The case presents a question of jurisdiction. Both parties are foreign corporations. This court has, by statute, jurisdiction over an action against a foreign corporation when such corporation can be found within the city. A corporation can be found where it can be served with a summons according to law. A foreign corporation can be served with summons according to law by service upon a managing agent. The service in this case was upon 'John P. Whiteman, agent of said Lamar Insurance Company, and the chief officer of its agency in the city of Cincinnati. No chief officer of said company found.' Such service is service upon a managing agent. *Am. Ex. Co. v. Johnston*, 17 Ohio St. 641. This court, therefore, has jurisdiction of the action, and the service of summons is according to law.

"It is true that there are special modes of service upon insurance companies provided by statute, but it has been expressly decided that such special modes are not exclusive, but cumulative. *Handy v. Aetna Ins. Co.* 37 Ohio St.—, (Ohio Law J. January 5, 1882.)

"It is urged that the courts of the state cannot, or at least should not, hear causes between non-residents; that there is enough litigation to which citizens of the state are parties to fill all the sessions of court. But the courts cannot refuse to hear causes that have a right to be heard, and it is impossible to contend that non-residents have not a right to sue non-residents in the courts of the state. The law makes no distinction between natural and artificial persons as to their right to sue or their liability to be sued. By the comity of all the states, foreign corporations can sue in their courts. *Bank of Augusta v. Earle*, 13 Pet. 519.

"It has not been questioned that a corporation can do business in states other than that in which it is chartered. By repeated decisions of the supreme court of the United States it is settled that a corporation can do business in such other state only by permission of such other state, and upon the conditions as such state may prescribe. Where a state by general law provides for a mode of service upon foreign corporations doing business within the state, such law is a condition upon which a foreign corporation can do business within the state; *Paul v. Virginia*, 8 Wall. 168; and, by doing business in this state, a foreign corporation assents to such condition. *Lafayette Ins. Co. v. French*, 18 How. 404.

"The courts of Ohio are open for any non-resident, whether a natural or an artificial person, to sue any other non-resident, whether a natural or an artificial person, upon complying with the requirements of the statute. 'Non-residents of the state and foreign corporations are as much subject to its jurisdiction as are residents and domestic corporations. Except in actions of a local nature our courts are open to all who may seek relief therein against any one who may be reached by its process.' *Handy v. Aetna Ins. Co. supra*.

"If it is suggested that the national courts are the proper forum in actions between non-resident corporations, it is held otherwise. In the reports of the supreme court of the United States, corporations are always termed citizens

of the state by which they are chartered. As such they are held included in the word 'citizens' in the constitution of the United States and in the removal acts. The act of 1875 for removal of causes from state to national courts expressly recognizes the jurisdiction of state courts over actions between non-resident citizens. The same express recognition is made by the supreme court of the United States. *Barney v. Latham*, 103 U. S. 205.
 "Motion overruled."

Provisions of Ohio statutes as to consent of foreign insurance companies to be sued and service made upon certain agents, (section 3657, Rev. St. 1880,) and where actions against foreign corporations generally to be brought, and how service of process made, (sections 5030, 5045, 5046, Rev. St. 1880.)—[REP.]

KING v. HAMILTON.

(Circuit Court, D. Oregon. June 21, 1882.)

1. PROMISSORY NOTE.

A note for 500 pounds sterling is payable in a certain sum of "money" and therefore negotiable, and *prima facie* made upon a sufficient consideration.

2. POUND STERLING.

By section 2 of the act of March 3, 1873, (11 St. 603; section 3565, Rev. St.,) it is provided that "in the construction of contracts payable in sovereigns or pounds sterling" each pound shall be valued at \$4.8665. *Held*, that in an action upon a note payable in pounds sterling it is not necessary to aver or prove the value of such pound in money of the United States, but that the court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute.

Action upon Note.

Ellis G. Hughes, for plaintiff.

William H. Effinger, for defendants.

DEADY, D. J. This action is brought by the plaintiff, a British subject, against the defendant, a citizen of Oregon, upon a promissory note alleged to have been made by the defendant on January 29, 1879, and delivered to "Mrs." John Pollock, "for the sum of 500 pounds sterling, money of the united kingdom of Great Britain and Ireland," payable in one year after date, with interest at the rate of 5 per centum per annum; which note was afterwards duly transferred to the plaintiff, and is still unpaid. The complaint concludes with a prayer for judgment against the defendant for said sum of £500 and interest, or "its equivalent in money of the United States." Nothing is alleged as to where the note was made or made payable.

The defendant demurs because (1) the complaint does not state facts sufficient to constitute a cause of action; and (2) it does not appear that the note was made "for value." Upon the argument of the demurrer the point made by counsel for defendant was that the note was not made for "money" but a commodity, and therefore it was neither negotiable nor presumed to have been made upon a sufficient consideration, but that the same must be alleged as in the case of an ordinary simple contract. In support of the demurrer counsel cites *Com. v. Haupt*, 10 Allen, 38; Edwards, Bills, 128; Byles, Bills, 92; *Robinson v. Hall*, 28 How. Pr. 342; Abb. Law Dict. "Money." The rule that bills and notes must be for the payment of "money" only is admitted. Story, Bills, § 43; Byles, Bills, 92; Chitty, Bills, 133; Daniell, Neg. Inst. § 50. But it is equally well established that they may be made payable in the "money" of any country—in its coins, "such as guineas, ducats, Louis-d'ors, doubloons, crowns, or dollars; or in the known currency of a country, as pounds sterling, livres, tournoises, francs, florins, etc.; for in all these cases the sum of money is fixed by the par of exchange or the known denomination of the currency with reference to the par." Story, Bills, § 43; Daniell, Neg. Inst. § 58; Edwards, Bills, 137-8; *Black v. Ward*, 27 Mich. 191; *Thompson v. Sloan*, 23 Wend. 74.

It follows that a note payable in pounds sterling or British sovereigns is payable in "money" just as much and as certainly as if it was payable in dollars. The case is different from a note made payable in "currency," which may be "money" only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money.

As was said in the court in *Thompson v. Sloan*, *supra*, a bill or note payable in money of a foreign denomination is negotiable, "for it can be paid in our own coin of equivalent value, to which it is always reduced by recovery. A note payable in pounds sterling and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially." It is also said in the books that the plaintiff in such case should allege and prove the value of the sum expressed in foreign money in the money of the United States, which has not been done here. But I apprehend that this is now unnecessary.

By section 2 of the act of March 3, 1873, (17 St. 603; section

3565, Rev. St.,) it is provided that "in all payments by or to the treasury the sovereign or pound sterling" shall "be deemed equal to \$4.8665;" and this rule is further declared applicable to the appraisement of imported merchandise when the value of the invoice is expressed in pounds sterling, "*and in the construction of contracts payable in sovereigns or pounds sterling;*" and this valuation is declared to be the par of exchange between Great Britain and the United States. The provision concerning contracts payable in sovereigns or pounds sterling is new in the legislation of the United States.

In the *Collector v. Richards*, 23 Wall. 246, this act came before the supreme court, and the opinion of Mr. Justice Bradley is instructive upon the subject under consideration. It seems to have been taken for granted that the pound sterling is money, and known as such to the court independently of the act of congress; and money, too, that can, in a judicial proceeding, be converted into money of the United States upon proof of the par of exchange. He says:

"Although the sovereign or pound sterling, as a coin, has only existed since the year 1817, the amount of pure gold contained in the pound sterling (estimating the guinea at 21 shillings) has been 113.001 grains ever since the year 1717; and as the United States dollar contains 23.22 grains of pure metal, it only requires a process of simple division to show that the value of the sovereign is precisely what the second section of the act determines it to be. This intrinsic value of the pound sterling, as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British empire during the period of our own colonial history, of which all our courts were required to take judicial notice; and its continuance to the present time is a public fact as well established as any other act of the British government."

The contract sued on here is a contract for the payment of "money," and not a "commodity." It is also a contract for the payment of pounds sterling, and therefore within the purview of the act of 1873, *supra*, which establishes the value of this foreign coin in money of the United States. It is not required to aver or prove what the law establishes, and therefore, in giving judgment for the plaintiff in this action, it is only necessary to convert the 500 pounds into dollars at the rate of 4.866 $\frac{1}{2}$ of the latter to one of the former. Beyond a doubt, then, this note was made for "money," and for a sum certain, because a note for any number of pounds sterling is only another form of expression for the equivalent in dollars, which equivalent is now prescribed by statute.

The case of the *Com. v. Haupt*, (10 Allen, *supra*,) in which the an-

nual report of the mint was taken as the value of the pound sterling, (\$4.8448,) arose under the act of 1857 (11 St. 163) and was decided prior to the passage of the act of 1873.

The demurrer is overruled.

BAXTER v. HARTFORD FIRE INS. CO.*

(Circuit Court, D. Indiana. June 24, 1882.)

INSURANCE—ELEVATORS—INSURABLE INTEREST—GRAIN THEREIN.

A commission merchant engaged in the business of buying and selling grain, and in connection with such business owning and operating an elevator in the usual way, has such an interest in the grain deposited in his elevator by others as to authorize him to insure it for its full value; and this is so, although the contract between him and the depositors of the grain stipulates that the grain in store is subject to his charges, and that fire is at the owner's risk.

David Turpie, for plaintiffs.

Harris & Calkins, for defendants.

GRESHAM, D. J. This is a suit on a fire policy issued by the defendant to the plaintiffs on grain, seeds, and sacks, their own, or held by them in trust or on commission, or sold but not delivered, contained in their elevator at Rochester, Indiana. The elevator and its contents were destroyed by fire. As to 2,238 bushels of wheat in the elevator at the time of the fire, it is averred in the third paragraph of the answer that this wheat was delivered to the plaintiffs by farmers after the insurance was taken, every one of whom, at the time of such delivery, received and accepted from the plaintiffs a written instrument or contract, specifying and describing the amount and character of wheat by him delivered, and concluding as follows: "Wheat in store subject to our charges. Fire at owner's risk." It is also averred that it was not the intention of those depositing the wheat, or the plaintiffs, that it should be covered by the policy sued on, and that at the time of the fire the plaintiffs had in the elevator wheat of their own. These facts are pleaded against a recovery for more than the plaintiff's lien for charges on the 2,238 bushels of wheat.

The plaintiffs demur to the third paragraph of the answer.

*Reported by Charles H. McCarer, Asst. U. S. Atty.

It is urged by the defendant's counsel that the wheat described in the paragraph demurred to was held on deposit, under an agreement between the depositors and the plaintiffs that it was not to be insured, and that therefore the plaintiffs, who were bailees, had no authority to put it under their policy and charge the depositors for insurance. The plaintiffs were commission merchants, engaged in buying and selling grain, and in connection with their business they owned and operated an elevator in the usual way. Those who deposited wheat in this elevator took receipts for the same, knowing that it could never be distinguished from the mass with which it was mingled, and that the plaintiffs could and would sell and ship it as their own in the course of their business. It is not claimed that this 2,238 bushels of wheat was to be kept separate from other wheat in the elevator of the same grade. The title to this and other wheat deposited in the elevator as it was, remained in the depositors, or it passed to the plaintiffs. The contract between the plaintiffs and the depositors was, not that the latter should on demand receive the identical wheat stored in the elevator, but that the plaintiffs should deliver wheat equal in amount and grade to that deposited, or account for its value. Being authorized to sell the wheat on their own account as fast as it was deposited in the elevator, I think the plaintiffs had such an interest in it as authorized them to insure it for its full value. They were under no obligation to return the identical wheat stored in their elevator, and no one expected them to do so. *Carlisle v. Wallace*, 12 Ind. 252; *Johnson v. Brown*, 36 Iowa, 200.

But, on the theory that the title to the wheat described in the paragraph demurred to remained in the depositors, and that they took the risk of loss by fire, under their contract with the plaintiffs, still the latter were liable for its value if fire should result from carelessness on the part of their employes, and they had a right to protect themselves from this liability by insuring the wheat for its full value; and, further, if this wheat remained the property of the depositors, as bailors, there was nothing in their contract with the plaintiffs which prohibited them, as bailees, from insuring it for its full value. The defendant was not a party to these agreements. It is true, there is an averment in the paragraph demurred to, that it was not the intention of the depositors or the plaintiffs that the wheat should be covered by the policy sued on; but that is only the pleader's construction of the instruments or contracts which the depositors received from the plaintiffs.

Demurrer sustained.

UNITED STATES v. THE HENRIETTA ESCH.

(Circuit Court, S. D. Alabama. 1882.)

SMUGGLING—CIRCUMSTANTIAL EVIDENCE—CONDEMNATION.

Where, in an action against a vessel for an attempt to smuggle foreign goods liable to customs duties, there is an irreconcilable conflict in the evidence given on the one side by the government officers, and on the other by the officers and part of the crew of the suspected vessel, and the case made out by the government witness shows—*First*, concealment on the part of the captain and mate of the fact that the suspected vessel had come in through the pass, where, on an island in said pass, the smuggled goods were found, instead of coming in by the main channel; *second*, prevarications and misrepresentations excusing the fact that she had no boarding officer aboard; *third*, absence of the yawl and all of the crew on the night of the seizure of the goods, together with finding on the yawl mud and grass similar to that where the goods were found; *fourth*, a spliced oar produced in court, and found at the place of the goods which a witness identifies as the same as that he saw the day previous on board and belonging to the vessel's yawl; *fifth*, finding on board the vessel, after seizure, goods of the same brand in small quantity in the possession of the captain, with other circumstances, are sufficient to warrant the judgment of condemnation rendered by the district court, and such judgment will be affirmed.

On Appeal.

George M. Duskin, U. S. Atty., for the United States.

Anderson & Bond, for appellants.

PARDEE, C. J. The cigars and cigarettes found under a tarpaulin on the end of Pinto's island were undoubtedly foreign articles, brought there from some vessel to be smuggled into the United States. When found they evidently had not been there any great length of time. It seems clear, also, that they must have been brought to the port of Mobile by the Zachary Taylor, the Henrietta Esch, or the Myra A. Pratt, for these were all the foreign vessels arriving from April 2 to April 14, 1879, the day when the cigars were seized. The Zachary Taylor arrived on the twelfth of April, reported at the regular boarding station at Fort Morgan, took on an inspector, and went directly to town. She was carefully examined, and there is no suspicion in the record as to any illicit conduct on her part. The same may be said, in substance, of the Myra A. Pratt, which arrived on the 14th, with the additional exculpatory fact that she arrived after the time fixed by the witness Isadore Tranier of his discovery of the suspicious goods. The Henrietta Esch arrived early in the morning of the 13th. She took on no boarding officer, having passed westwardly from Pensacola light—by Sand island—and Mobile bar along the shore to

Horn island pass, and thence through that pass and Grant's pass to Mobile bay. She anchored early in the morning of the 13th, and lay for several hours near the place where the cigars were found before going to the wharf at Mobile. So far there is no conflict of testimony, and yet, from it, it seems clear that a case of strong suspicion is made against the Henrietta Esch.

As to the balance of the case, I have examined the entire evidence, and re-examined it, with the endeavor to reconcile the conflicting statements, or find the key which would lead to the truth of the case. I find it impossible to harmonize the evidence. The witnesses, on one side or the other, have falsified; and their evidence on one side must be rejected. The evidence of Captains Rabby, Schlieff, Avery, and Terry is not in question. It may be all taken as true and correct and not affect the case, because it is all negative in character and not necessarily inconsistent with the charge against the Henrietta Esch.

The real question comes between the government witnesses and the captain, mate, and two boys of the schooner.

The government witnesses, although mainly officers of the customs, are not shown to have any interest in the case beyond that naturally arising in the proper prosecution of their duties. Isadore Tranier, the discoverer of the goods, does not appear to have any interest. The captain of the Esch and the colored boy, Johnson, are chargeable only with general interest in the schooner on which they were employed; and the mate and his son are in the same category, only the mate is one-half owner of the schooner implicated. And here it may be noticed that two men were on the schooner from Kingston to Mobile. Antonio Sylvestre, one of the crew, and Antonio Sylvo, a disabled sailor, have not been called. Sylvestre, it appears, run away when the schooner was seized. Sylvo is not accounted for.

The case, as made by the government witnesses against the schooner, in addition to the point first referred to,—*i. e.*, that the Esch was the only vessel that could have committed the offence,—shows:

- (1) Concealment on the part of the captain and mate of the fact that the Esch had gone to the westward and come in through Grant's pass, instead of by the main channel;
- (2) prevarications and misrepresentations excusing the fact that the schooner had no boarding officer aboard;
- (3) absence of the yawl and all of the crew of the Esch on the night of the seizure of the cigars, together with finding on the yawl mud and grass similar to that where the cigars were found;
- (4) a spliced oar produced in court and found at the place

of the cigars, which one witness, Samuels, identifies as the same spliced oar that he saw the day previous on board and belonging to the Esch's yawl-boat; (5) finding on board the Esch, after the seizure of the cigars, cigars of the same brand in small quantity in the possession of the captain.

There are several other circumstances of a suspicious nature shown, but the foregoing are the important ones.

The respondents meet these circumstances mainly by a vigorous denial either of the particular fact, or by a general denial that the Esch brought the cigars. The concealment of the schooner's course and the excuses made for not taking on a boarding officer are almost entirely unexplained. The absence of the yawl and crew is denied. The spliced oar is repudiated, and the fact that when siezed the Esch had only one oar for her yawl is explained by a circumstantial account given by all of the witnesses of the loss of an oar overboard in the gulf on the homeward voyage. The mud and grass on the yawl are accounted for by showing that the two boys had the boat in the day-time, rowing for pleasure in the harbor, making a landing at one place where there was sand and grass. Nothing is said as to the particular brand of cigars given by the captain to his friends.

Finding, as I have before, that the evidence on one side must be rejected, I cannot avoid the conclusion that the evidence of the government witnesses is best entitled, under all the circumstances, to credence. This evidence, with that undisputed in relation to the opportunity for the Esch to have unloaded the goods, and that no other vessel could have done so, makes a complete case for the government, and warrants the judgment of condemnation rendered by the district court.

A decree will therefore be entered affirming the judgment rendered in this case by the district court, with costs.

THOMPSON v. CANTERBURY, Adm'r.

(Circuit Court, D. Iowa. July, 1881.)

ESTATES OF DECEASED—CONTRACT OF ADMINSTRATOR.

A contract with administrators or executors made in the interest and for the benefit of the estate, if made upon a new and independent consideration, as for property sold and delivered, or other consideration moving between the promisee and executors as promisors, does not bind the estate, and a suit thereon against the administrator as such, and not personally, is demurrable. Doctrine applied to a case where the administrator sold and delivered a patented article for the benefit of the estate.

On Demurrer. Action for damages.

This was an action for damages brought against an administrator, in his representative capacity, for a violation of plaintiff's rights, by selling and conveying to divers parties, a certain article which plaintiff claims the exclusive right to make and vend.

Bremmerman & Rohde, for plaintiff.

P. H. Smyth & Son, for defendant.

McCRARY, C. J. The defendant is sued as administrator for having, in violation of plaintiff's rights, sold and delivered certain patented articles. If defendant did make the sales in question, as alleged, he did not thereby bind the estate. Whether his act be regarded in the light of a contract or a tort, it is clear that he did not bind the estate represented by him, and that no recovery can be had against him in his representative capacity, or to be levied *de bonis testatoris*. Even a contract with administrators or executors, made in the interest and for the benefit of the estate, if made upon a new and independent consideration, as for property sold and delivered, or other consideration moving between the promisee and the executors as promisors, does not bind the estate. This upon the ground that an administrator or executor may disburse and use the funds, or charge the estate, only for the purposes authorized by law, and may not bind the estate by a new contract, thus creating a liability not founded upon a contract or obligation of the testator or intestate. *Austin v. Munro*, 47 N. Y. 360, and cases cited; *Tollér, Executors*, 457. Of course, if the administrator could not bind the estate by a contract to pay plaintiff the sum he now claims as damages, he could not do so by his own wrong in violating the plaintiff's rights under the patent.

As defendant is sued as administrator, and not personally, the demurrer must be sustained.

SINGER MANUF'G CO. v. YARGER.

(Circuit Court, D. Iowa. October, 1880.)

1. TAX SALE—COLLUSIVE BIDDING—CERTIFICATE VOID.

Where there was a tacit agreement among the bidders present at a tax sale that they were to take turns in bidding, and that they were not to bid against each other, the sale and certificate are void.

2. SAME—ASSIGNEE TAKES, SUBJECT TO INFIRMITIES.

The assignee of such a certificate holds it subject to all the infirmities by which it would have been affected in the hands of the purchaser at the sale.

3. SAME—EQUITABLE RELIEF FROM FRAUD.

Where fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. So, in the case of a fraudulent combination to deprive a mortgagee of his security by procuring a sale of the mortgaged premises for taxes without notice and without competition among bidders.

In Equity.

Phillips, Goode & Phillips, for complainant.

McCRARY, C. J. The complainant is the owner of a mortgage executed by the defendant, Yarger, upon certain lots in the city of Knoxville, in this state, given to secure a promissory note for \$2,000 and interest. The respondents McCormick and Baker are the grantees in a certain tax deed of the same premises, which, if valid, is prior and paramount to the complainant's mortgage. The bill alleges that the tax deed is void, and prays a decree to cancel the same and for a foreclosure of the mortgage. The question to be decided is whether the tax deed is a valid conveyance of the property as against the complainant's mortgage. The tax deed is attacked upon the ground that the tax sale was fraudulent and void by reason of the fact that the bidders at the sale entered into an unlawful combination, whereby each was to take his turn in bidding, it being understood that there was to be no competition, and that they were not to bid against each other.

The evidence establishes the fact that there was, if not an express, at least a tacit agreement among the bidders present at the sale that they were to take turns in bidding, and that they were not to bid against each other. That such a combination among bidders is fraudulent, and vitiates the sale, is, as a general proposition, entirely clear. Whether this doctrine is applicable to the present case is the only matter of controversy. The respondents McCormick and Baker, who claim under the tax title, were not the purchasers at the tax sale, but are the assignees of the tax certificate. It is settled as the

law of this state that the assignee of such a certificate holds it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser. *Light v. West*, 42 Iowa, 138.

It is insisted by counsel for respondents that the tax deed can be attacked on the ground of fraud in the sale only by the owner of the land, and not by a mortgagee. In support of this proposition section 897 of the Code of Iowa (1873) is cited. That section, among other things, provides "that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same, or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void." While this section gives a remedy only to the owner of the land, it cannot, in my judgment, be rightly held to deny a similar remedy to others. The complainant's right to recover in the case does not depend upon the statute. If a fraud has been committed, and by it the complainant has been injured, the remedy is provided by the general principles of equity jurisprudence.

It cannot be presumed that the legislature of the state intended by the provision above quoted to deprive any person of a remedy for an actual fraud which existed independently of the statute. Suppose the case of a fraudulent combination to deprive a mortgagee of his security by procuring a sale of the mortgaged premises for taxes without notice to the mortgagee, and without competition among bidders. Will it be contended that in such a case the mortgagee could have no remedy, because a remedy in a similar case is given by statute to the owner? I think not. If the statute would bear such a construction, it is more than doubtful whether it would have the effect to deprive this court of its equity jurisdiction in such cases. *U. S. v. Howland*, 4 Wheat. 108; *Dodge v. Woolsey*, 18 How. 347; *Barber v. Barber*, 21 How. 588; *Lawrence v. Clark*, 2 McLean, 568; *Boyle v. —*, 6 Pet. 648; *Noonan v. Lee*, 2 Black, 500.

Decree for complainant.

*In re W. H. Blumer & Co., Bankrupts.**

(District Court, E. D. Pennsylvania. May 3, 1882.)

1. BANKRUPTCY—PARTNERSHIP—JOINT AND SEPARATE ASSETS—COSTS.

Where the members of a firm are adjudicated bankrupts, the costs of the proceeding must, under section 36 of the bankrupt act, (section 5121, Rev. St.) be apportioned *pro rata* between the partnership and separate estates; and if, after deducting the portion of the costs chargeable to the partnership estate, there is any balance of partnership assets, however small, the partnership creditors will not be entitled to share *part passu* with the separate creditors in the distribution of the separate estates.

2. SAME.

Semble, that if there are partnership assets the fact that the assignee, in a vain attempt to realize more, incurs costs larger than the amount of such assets, will not entitle the partnership creditors to share with the separate creditors in the distribution of the separate estates.

This case came before the court upon the report of the register as to the assets belonging to and the costs chargeable against the joint and separate estates of the bankrupts respectively. His report showed the following facts:

William H. Blumer, Jesse M. Line, and William Kern, individually and trading as William H. Blumer & Co., were adjudicated bankrupts. The amounts realized from the respective estates were as follows:

From the partnership estate,	-	-	-	-	-	\$ 3,438 51
“ separate estate of W. H. Blumer,	-	-	-	-	-	15,122 44
“ “ “ J. M. Line,	-	-	-	-	-	51,951 14
“ “ “ W. Kern,	-	-	-	-	-	23,327 32

All of the estates were insolvent.

The partnership creditors claimed that against the \$3,438.51 realized from the partnership assets should be set off the following amounts:

Costs of clerk, marshal, register, assignee, etc., in the bankruptcy proceedings,	-	-	-	-	-	\$4,777 06
Costs of proofs of debt against the joint estate,	-	-	-	-	-	1,358 00
Judgment in favor of the United States against the partnership, entitled to priority of payment,	-	-	-	-	-	796 31
						<hr/> \$6,931.37

As this would more than exhaust the partnership estate, they claimed that the case was to be treated as if there were no partnership assets, and that they should share in the separate estates *pari passu* with the separate creditors. This claim was resisted by the latter. It appeared that the large amount of the costs was owing to the fact that various circumstances—including, especially, the imperfect condition of the bankrupts' books—rendered necessary a protracted examination for the purpose of obtaining information with

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

regard to the condition of the bankrupts' affairs; and that, although this examination did not result in any increase of the assets, yet it was, in the opinion of the register, necessary and proper. It also appeared that the only portion of the costs which could be specifically charged to the realization of the partnership assets received was the assignee's commission, viz., \$49.68.

W. D. Luckenbach and T. B. Metzger, for assignee.

John D. Stiles, Edward Harvey, R. E. Wright, Jr., P. K. Erdman, R. C. McMurtrie, and John Rupp, for creditors.

BUTLER, D. J. Important questions discussed by counsel, (respecting the effect of section 36 of the bankrupt act,) may be passed, in this case.

Where joint and separate assets are realized, and may be distributed to creditors of the respective estates, it cannot, of course, be doubted that the rule of "joint to joint, and separate to separate," applies. In this case joint as well as separate assets were realized. More than \$3,000, over the cost of realization, were received by the assignee. A part of this we think might have been distributed to creditors. If it had been, or the account had been closed with the sum in hand, it is not pretended that the joint creditors could share in the separate estates. Can it be that an expenditure of the money on their account, in a vain (though doubtless proper) endeavor to obtain more, changes the rule of distribution? Such a view would seem unreasonable; and especially so in this case, where the money was expended in a fruitless effort to transfer to them the exclusive enjoyment of the very property now in controversy. Although defeated in this, the money was very profitably spent, for the joint creditors, if by such expenditure they have acquired a right to share this property. We do not think, however, they have.

But if this were otherwise the provision respecting costs and expenses, contained in the section, (36,) when applied here, leaves a similar balance of joint estate. The assignee is required to "keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and after deducting from the whole amount received by the assignee, the whole amount of expenses and disbursements, the net proceeds of the joint estate shall be apportioned to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." This requires an ascertainment of the net proceeds of each estate, by means of the deduction specified,—in other words, by apportioning the entire costs to the respective estates *pro rata*,—the only method whereby the provis-

ion can be carried out: *Smith v. Smith*, 13 N. B. R. 500. In a majority of cases such apportionment of costs is just and equitable. When applied here, as before remarked, a considerable balance of joint estate is left for distribution. That the percentage to creditors may be inconsiderable is unimportant. The register will therefore deduct the costs and expenses as herein indicated, distributing the balance of joint assets to joint creditors, and of separate assets to separate creditors.

It is proper to say that circuit Judge McKENNAN, who sat with the district judge, concurs in this opinion.

GARDNER and others v. HERZ and another.

(Circuit Court, S. D. New York. June 27, 1882.)

PATENTS FOR INVENTIONS—REISSUE—WANT OF NOVELTY.

Where the form of a chair seat was old, the material used old, and the method of imparting the form to the material was old, the reissue was devoid of any patentable novelty.

Gifford & Gifford, for complainants.

Foster, Wentworth & Foster, for defendants.

WALLACE, C. J. This action is brought to restrain the infringement of reissued letters patent No. 9,094, dated February 24, 1880, granted to the assignees of George Gardner for an improvement in chair seats. The reissue contains two claims, of which the second only need be stated, which is: "A chair seat made of laminæ of wood glued together, with the grains in one layer crossing those of the next, concave on the upper surface, convex on the lower surface, and perforated, as a new article of manufacture, substantially as set forth."

The original patent was granted to Gardner May 21, 1872, and contained but a single claim, as follows: "As a new article of manufacture, a chair seat constructed of veneers of wood, with the grain running crosswise of each other and glued together, all substantially as set forth, and for the purpose specified." This patent has been twice reissued, the first reissue bearing date July 4, 1876. The first reissue has been before this court upon a motion for a preliminary injunction founded upon it, and it was decided by Judge Blatchford upon that occasion that none of the claims of that reissue were

valid except the sixth, which was not in controversy, and therefore was not considered. The second claim of that reissue was as follows: "As a new article of manufacture, a bottom for a seat frame constructed of two or more veneers or thin layers of wood, with the grain of one layer crossing that of the other, said layers being secured together by an adhesive substance, and having perforations formed therein for the purpose of ventilation or ornamentation, substantially as set forth." On that occasion Judge Blatchford held that the claim of the original patent was anticipated by a patent granted to John K. Mayo, one of the present defendants, December 26, 1865, and reissued to him and two others, August 18, 1868, in eight divisions. This patent was for an improvement in the manufacture of the material, which consisted in cementing together a number of scales or veneers of wood with the grain of the successive pieces running crosswise or diversely, so as to form a firm material adapted for the construction of various articles, including chairs and settees. In Division E of the reissue the specification states: "In the chair, figure 2, the bottom, B, may be formed of flexible material made up by the union of two or more thin layers of wood having the grain crossed or diversified in direction and united by suitable cement." The specification also states that "by adopting the well-known process of wet and dry heating in the course of manufacture the several scales of wood may be brought to such a state of pliability as to assume any desired form by compression in a matrix or upon formers." Upon the occasion referred to Judge Blatchford likewise held that there was no patentable novelty in the second claim of the first reissue of Gardner's patent, in view of the patents prior to Gardner's—one to Tice and one to Cochrane—for perforated chair seats of metal or gutta percha. It follows, therefore, that the only question not heretofore decided by this court and now open, relating to the present reissue, is whether the concavity of form which is an element of the new claim in this reissue will support the patent. Chair bottoms made of board, and softened by steam and pressed to a concave shape, in a mould, so that the form of the seat will conform to the shape of the person who may occupy it, are shown in the letters patent issued to Z. B. Bellows, bearing date March 15, 1859. So, also, the concave or dishing form of chair seats had been adopted long before Gardner's patent in ordinary chair seats. In the specification of the present reissue the inventor states that he does not lay any claim to the veneers crossing each other and glued together, as these have been used for various purposes, and have become

public property, and that he does not claim the pressing of a chair seat in the concave form by dies.

If there was no patentable novelty in using the perforations of the metal or gutta-percha chair seats in the veneer seats, by Gardner, neither can there seem to be any in employing a well-known form of chair seat in his veneer seat. As it had been pointed out by Mayo that the material used is pliable, and can be pressed into any desired form, and as the reissue disclaims the pressing of a chair seat in a concave form, and as chair seats had been so formed, it is difficult to see how there was any invention in Gardner's chair seat. Gardner merely applied a process that was old to a material that was old to obtain an old form. Considered as a combination it is hardly possible to believe that the perforations or the concavity performed any new functions in the Gardner seat. An ingenious theory has been presented, to the effect that the perforations and concavity co-operate in Gardner's seat to prevent warping and curling of the material used. If this is true, the same elements were combined in the Bailey chair back, and performed there the same functions they performed in the Gardner seat. It may be that the Gardner seat is mechanically a better seat than any which preceded it, but his improvement is not a patentable one.

It is strenuously insisted that the popularity and success achieved by the Gardner seat beyond those of his predecessors affords cogent evidence both of the utility and patentable novelty of his invention. The answer to this argument is that the success of his seat is probably due to a feature which is not suggested in the original patent; that is, its adaptability for use by unskilled workmen. His seats as now made can be fitted without mechanical skill to a bottomless chair, and are largely used to repair chairs in which the original seats have been worn out, and can be so used without any special skill. They are also largely sold to chair manufacturers, because they can be easily adapted to chairs of different sizes and seats of different forms. But the chair seat described in Gardner's original patent and shown in the drawings did not practically possess this characteristic of adaptability, but was a frame seat which could only be fitted to a chair by a skilled laborer. Such a chair seat would fail to meet the peculiar want which the present chair seat supplies. Considered as a new article of manufacture, if the complainants' chair seat has no frame, and its novelty and utility consist in its adaptability to be sold separate from the frame and to be readily ap-

plied by any person to any chair; then the reissue is for a different invention than that disclosed in the original patent.

In conclusion, in view of the former decision of this court the complainants can only succeed upon the theory that by imparting a concave form to his chair seat he has imparted sufficient patentable novelty to his article to sustain a patent; and this when such a form of chair seat was old, the material used old, and the method of imparting the form to the material was old. This theory cannot stand.

The bill must be dismissed.

PELHAM v. DEMAREST.

(Circuit Court, S. D. New York. June 28, 1882.)

PATENTS FOR INVENTIONS—DEVICES PERFORMING DIFFERENT FUNCTIONS.

Where the devices in the hod elevator patented by defendant are not the equivalents of the complainant's, but perform a different function, there is no infringement of plaintiff's patent.

Kitchen & Brown, for complainant.

Frost & Co., for defendant.

WALLACE, C. J. The first claim of the letters patent No. 95,262, granted September 28, 1869, to Thomas M. Pelham for an improved hod elevator, is in controversy in this action. That claim reads as follows: "A hod-elevating platform arranged to support the hods by the shanks at the edges on the bottom or floor, and by leaning the under side of the top and the upper part of the shanks against notched bars, substantially as specified." The invention relates to improvements in hod-elevating platforms such as are used by builders for elevating and returning the hods containing bricks, mortar, etc., and has for its object to provide an arrangement whereby the persons who take the hod from the platform after it is elevated may do so without being required to step on the platform in shouldering the hod.

The French patent of March, 1860, granted to George Johnson, of London, describes a hod elevator having the same purpose as Pelham's device, and so constructed that the hods, when the platform is elevated, can be removed from the platform by the workman without requiring him to step upon the platform. In view of this French patent, the complainant's patent is to be limited so as to embrace

only the particular devices described in his patent, and their equivalents for performing the same functions. A particular description of these devices is unnecessary. It suffices to say their operation is such that when the end of the hod shank rests in the floor socket the bowl and shank of the hod at and near their junction will be supported by the cross-bar, and be so far inwardly out of perpendicular with the floor socket that they will be kept in place by the weight of the hod-bowl and its contents, the center of gravity being on the inward side of the cross-bar.

A practical disadvantage results from the principle of the complainant's invention, whereby the open end of the hod-bowl is presented to the workman when he proceeds to remove the hod, and he is required to reverse the end of the bowl, and the contents of the bowl are thus liable to fall out. Upon the proofs the conclusion is reached that the apparatus actually used by the defendant, and which is alleged to infringe the complainant's patent, is that described in letters patent issued to the defendant, No. 231,021, bearing date August 10, 1880. The devices in the hod elevator patented by the defendant are not the equivalents of the complainant's, but perform a different function. Their office is to hold the hod in a vertical position, and resting on its shank instead of on the cross-bar. By the defendant's devices the closed end of the hod-bowl may be on the outer side of the cross-bar, and when it is thus presented to the workman he does not require to reverse the end of the bowl, and there is no liability that the contents of the bowl will escape.

The defendant does not infringe, and the bill is dismissed, with costs.

FISH v. DOMESTIC SEWING MACHINE CO.

(Circuit Court, S. D. New York. May 13, 1882.)

1. PATENT FOR INVENTION—DELAY IN APPLICATION FOR REISSUE.

The numerous patents obtained by the patentee between the time of his alleged invention and the time of his application tends strongly to refute his theory for delaying to make such application.

2. REISSUE—REFERENCE TO FORMER APPLICATION.

The fact that a patentee failed to refer in a former application to a feature subsequently patented by him pertaining to and used for the same purpose as the former, alleged to have been made by him prior to the one first patented, is very improbable, as the mention of such would have been a most important contribution to the value of the former.

3. SAME—PRELIMINARY INJUNCTION DENIED.

Motion for preliminary injunction denied where patents have not been established, and complainants show only a limited acquiescence on the part of manufacturers, and defendant for years openly asserting their invalidity.

In Equity.

T. C. Woodward, for plaintiff.

John Dane, for respondent.

WALLACE, C. J. I am not satisfied that complainant had perfected the invention described in his patent of February 13, 1872, any considerable length of time before his application for that patent. The numerous patents obtained by him between 1859 and the application tend strongly to refute his theory for delaying to make application. It is very improbable that he had invented his locking device at the time he applied for the patent of 1872, as that patent does not hint at any such feature, and it would have been a most important contribution to the value of that patent. In this view of the case, I think the defendant has succeeded in casting sufficient doubt upon the originality of the invention to defeat an application for a preliminary injunction. The patents have never been established. The complainant shows only a limited acquiescence on the part of manufacturers, while the defendants for several years seem to have openly asserted their invalidity, and the right to appropriate the improvements.

The motion is denied.

THE ALICE

(District Court, S. D. Florida. June, 1882.)

1. SHIPPING—BILL OF LADING—DAMAGES FOR NON-DELIVERY.

Where but a portion of the cargo stated on a false bill of lading was actually shipped, and the owner of the vessel is not shown to have been a party to the fraud, the only damages to be found in an action *in rem* against the vessel are for the non-delivery of the cargo shown to have been put on board.

2. SAME—FRAUD—LIABILITY OF VESSEL—QUÆRE.

Where the testimony of *the libellant* shows fraud on the part of the owner of the vessel in using false bills of lading, and also conclusively that but a small part of the cargo stated was ever shipped, can the vessel in an action *in rem* be held for the non-delivery of cargo more than is shown to have been received on board? *Quære.*

3. SAME—PRESUMPTION OF CONDITION OF GOODS.

Cargo is presumed to be shipped in good condition; and where the delay and dampness of the hold of the vessel are shown to have been sufficient to cause the damage found, if such delay has been unjustifiable, it is presumed to be the cause of loss and the vessel held liable.

4. NON-DELIVERY—MEASURE OF DAMAGES.

Where the voyage has not been completed and but scarcely commenced, and the cargo ruined by delay, the measure of damages for its non-delivery is its value at place of shipment and not at place of destination.

In Admiralty. Contract of affreightment.

G. Bowne Patterson, for libellants.

No claimant.

LOCKE, D. J. This is an action for damages for the non-performance of a contract of affreightment, in not carrying to their destination and delivering 524 bales of tobacco, appearing by a bill of lading to have been shipped on board this vessel at Santa Cruz, Cuba, for carriage to Falmouth, England, consigned to libellants, who advanced \$11,662 upon it. Although due notice has been given by publication, no claimant has appeared, and the case has been heard *ex parte*. The master of the vessel, although present, has put in no answer, but has been called by the libellants and testified, but there has been no defence to the allegations of the libel other than comes from the testimony introduced by them.

The master testifies that some time in October the brig, with a cargo of lumber, cleared from New York for Cienfuegos, Cuba, consigned to Roca & Co., of Manzanillo. The only document which she had showing her ownership or nationality was a sea-letter, purporting to have been obtained from the Costa Rican consul at New York, in which B. J. Wenberg was represented as owner, and which certified that if said vessel visited a Costa Rican port within 12 months she would be entitled to documents as a vessel of such nation. After discharging at Cienfuegos she went to Santa Cruz, where Roca & Co. loaded her with a cargo consisting of mahogany, lance-wood, fustic, granadilla, honey, and tobacco, and she cleared ostensibly for Falmouth, England, for orders. Before sailing, R. B. Pender, who had been master from New York, resigned his place, representing that he was not well, and T. T. Partridge, former mate, was appointed master by the acting United States consul, and finally signed the bills of lading and cleared the vessel. He states that he did not know the contents of the bills of lading, as they were in Spanish, a language which he did not understand; but that he inquired of Mr.

Roca if they were all right, and upon being told that they were he signed them. He says he had no knowledge of that part of the cargo taken on board after he was appointed master, but presents a cargo book of that received by him while mate, showing a very much greater quantity of different kinds of wood than the bills of lading call for. He says he had no knowledge of the amount of tobacco received on board, but states that none had been removed from the vessel after she was loaded at Santa Cruz until discharged in this port. He further testifies that before sailing Roca, the consignee of the vessel and shipper of the cargo, told him that he wanted the brig sunk; that he would put augers on board, and wanted him, Partridge, to sink the vessel out at sea, and that he should have \$3,000 from his agents in New York if he did it. A box, apparently made for the purpose, of red cedar, about three feet long, and three by four inches, securely nailed and lashed, marked "Mr. Pender, Santa Cruz," which has been opened in court and found to contain two large augers, is shown to have been sent on board by a gentleman in Santa Cruz, who had been on board the brig several times. Partridge testifies that Roca had been on board the brig several times, but none of the crew who saw the party bring the box to the boat knew either of the parties by name. It is shown by the testimony of the crew that it was brought to the brig's boat, then lying at the dock one evening, by the gentleman personally, passed into it, and taken on board by Capt. Pender. The augers are packed with a large number of custom-house blanks of an importing house at Manzanillo.

Partridge, the master, says that he replied to Roca, when told to sink the brig, that "it couldn't be done;" but Roca insisted that it must be; that he did not want the cargo to go to Europe. Partridge further says that he had no means to get home, and decided to remain in the vessel, take her to New York, and deliver her to the agents of Roca & Co. there; that he believed that Roca & Co. were her owners, although he had no proof of it; that he heard Roca say to Capt. Pender once that they had deposited \$25,000 in, and that was about all gone; and, at another time, either that "he was not owner," or that "he did not want to be known as owner;" he could not say which. He had no other evidence as to who was owner of the vessel. After leaving Santa Cruz, the brig was 19 days reaching this port, where she came in for water on the fourteenth day of January. The master not being able to obtain funds to pay bills by his application to Wenberg, at New York, to whom he telegraphed,

remained, incurred expenses, had a part of his cargo sold, and finally, the term of shipment of his crew having expired, advised them that he could not pay them and that they would have to resort to the vessel, which they did, by libel. She has been sold, the crew's wages and other liens paid, and this action now stands against a residue in the registry of the court.

It appears, upon a final discharge of the cargo, that of the 524 bales of tobacco receipted for on the bill of lading there have been found but 62 bearing the proper marks, and these in a damaged and worthless condition. Portions of cargo upon other bills of lading have been found equally deficient.

I have been thus particular in stating the case fully as it is admitted by libellants that their position is sustained rather by circumstantial evidence than by any positive proof. There is no direct evidence of the number of bales of tobacco which went on board, as the testimony of the mate who took account of it as it came on board has not been obtained, any further than the testimony of the entire crew that it came along-side in a small lighter, and, together with 40 barrels of honey, was taken on board in between two and three hours; that the hatches were then fastened and battened down, and so remained until opened here in port; and that nothing was removed until it was regularly discharged here; that they neither went into any port nor spoke any vessel from the time of leaving Santa Cruz until they arrived at Key West. The statements of the entire crew, a very respectable and reliable appearing company of men, agree in this, and there is not a question or doubt in my mind of their truthfulness.

Experts have measured the vessel, and computed the dimensions of the cargo required to fill the bills of lading, and testify that in their opinion it would have been impossible for the vessel to have contained all the cargo that was in her, together with that which was shown on the bills of lading but not found.

There was on board in the bottom of the vessel 398 lance-wood spars, 241 logs of mahogany, 60 logs of cedar, and 133 pieces of granadilla more than is stated on any bill of lading; and these quantities, together with those on the bills of lading, correspond with the amount shown by the cargo book of Partridge to have been received on board; 1,139 bales of tobacco, 12 pounds of turtle shell, 45 tierces of honey, and 160 bales of matting covers, called for by the bills of lading, are not to be found. Either this quantity of cargo never went on board, or it was taken out and replaced by an entirely differ-

ent class of merchandise between the time of leaving Santa Cruz and arriving in Key West.

The cargo found in excess was also found in the very bottom of the vessel. Had the cargo originally corresponded with the bills of lading, to bring this excess in the bottom of the vessel would have necessitated a discharge of the entire cargo and a reloading. The probability of this would be very slight, even putting the positive evidence of the whole crew aside; but, when considered in connection with their testimony, it cannot for a moment be believed that the cargo appearing on the bills of lading was ever on board the brig; and that the bills of lading are fraudulent cannot be doubted.

The story of Partridge, that Roca desired the sinking of the vessel, while it might be doubted if standing alone and uncorroborated, when taken in connection with the discrepancy of the cargo, both explains and is explained by it.

A bill of lading is always *prima facie* evidence of the shipment of a cargo, but in this case the presumption of its truth is entirely overthrown, and in the absence of positive proof to the contrary the necessary conclusion is that there was only the amount of tobacco shipped under the bill of lading in question that was found on board having the corresponding marks, viz., 62 bales.

The libellants in their libel have alleged a contract between Roca & Co. and the master of the brig, and the shipment of the entire number of bales of tobacco as charged; but they have by their testimony shown conclusively that but 62 bales were shipped. They now claim, nevertheless, that Roca & Co. were owners of the vessel, and parties to the false bill of lading; that the deficiency in the amount of cargo shipped under it cannot be considered as in their favor, and, the general owner being a party to the fraud, the damages for the non-delivery of the 524 bales of tobacco should be found against the vessel. The general rule that the shipment of the cargo, under a bill of lading, is necessary to give it validity, and support an action *in rem*, is well established, (*The Freeman v. Buckingham*, 18 How. 182; *Vandewater v. Mills*, 19 How. 82; *Pollard v. Vinton*, 11 Fed. Rep. 351;) and until the question of ownership is determined it is not necessary to inquire how far the fraud of the owner, where proven by the libellants, may give a lien upon his vessel which will support an action *in rem*, or how far such general rule is changed or varied by the owner's fraudulent connection with the issuing of the bills of lading.

This vessel, while in New York, appears to have been Wenberg's. Partridge testifies that he was hired as ship-keeper and afterwards

as mate by him, and was paid by him for his services on board before sailing. The only document which the vessel is shown to have had, represented him as owner. On the other hand we have only the belief of Partridge, which he seems to find difficulty in tracing to any foundation in fact more than random remarks of Roca.

It seems that when in need of funds he first applied to Wenberg, and although the reply, which directed him to draw against his freight or on his owners, might raise a presumption of the ownership being in some one else, it is not conclusive. Nowhere do we find that Roca & Co. assumed control as owners; the new master was appointed by the consul, apparently without their knowledge, as Partridge states that he took the information of his appointment to them by a note from the consul. This would be proper and necessary in the way of business, were Roca & Co. but consignees; and the final approvement of the appointment would in no manner prove ownership.

It is also argued that Roca's attempt to have the vessel sunk as alleged would prove his ownership; but when the amounts which are shown to have been obtained on false bills of lading, and the character of the attempted fraud, are taken into consideration, it can readily be believed that the property in the vessel would be but a matter of small importance to one entering upon such a scheme. A subsequent suit for wages as mate brought by Partridge against them, in which it is alleged that they were owners both of the brig and the unclaimed portion of cargo, shows that it is for his interest that both vessel and cargo be found to belong to the same party. Considering the entire case, I am not satisfied that the proof of Roca & Co.'s ownership has been sufficient to justify such conclusion, and this view does away with the necessity of considering the question of the result of fraud in the owner.

In every case where the goods have been shown not to have been put on board, the bill of lading has been held to be void; and although I have found no case where the point has been decided, there appears to be no reasonable question but what the amount received, when a cargo shown by a bill of lading has been but partially laden, should be the measure of the liability of the ship; and the question is as to damages for the non-delivery of the 62 bales shown to have been received on board. It appears that the tobacco was taken on board the twenty-fourth of December. When examined here March 16th it was found damaged, and when examined again after being discharged, May 8th, utterly worthless. The several experts who have

testified to its condition agree that the length of time that it had been in the hold of the vessel has been sufficient to cause its present condition.

Cargo, when received on board, is presumed to be good until the contrary is shown, and this presumption is strengthened where the circumstances and time of its detention have been sufficient to produce any existing damage found. In this case, although no unseaworthiness of the vessel has been shown, yet that is not sufficient ground to find that, had the vessel pursued her course to the declared destination, the cargo might not have been delivered in due time in good order. The lapse of time, dampness of the hold, and heat of climate have combined to ruin it. The delay of the vessel in this port gave opportunity to two of these elements of destruction, and it must be held to have been the cause of loss. The present condition of the tobacco is shown to be such that no consignee could be obliged to receive it, and the true measure of damages is its actual value or prime cost at the place of shipment. The voyage had in no respect been completed, or its risks and uncertainties passed. The supreme court has held in several cases that, in considering the measure of damages for marine torts; probable profit on merchandise should not be taken into account, (*The Amiable Nancy*, 3 Wheat. 546; *La Amistad de Ruis*, 5 Wheat. 385; *The Appolon*, 9 Wheat. 362;) and such rule will apply with equal reason to a case of breach of contract against the property of ostensibly innocent parties. This cost appears by the testimony to have been after paying export duties, shipping charges, etc., about \$22 per bale, or \$1,364 in all, for which amount the decree will follow.

The prayer for allowance of agent's expenses and proctor's fees beyond the statutory amount, although apparently just in amount, must be disallowed, in accordance with the ruling of the supreme court. All of the cases referred to and relied upon on this point have been overruled since the enactment of the general fee bill. *Vide The Baltimore*, 8 Wall. 392; *Oelrichs v. Spain*, 15 Wall. 230; *Flanders v. Tweed*, Id. 453.

LINDSAY, GRACIE & Co. v. CUSIMANO.*

(Circuit Court, E. D. Louisiana. May 8, 1882.)

1. CHARTER-PARTY—CUSTOMARY DISPATCH.

The construction and explanation of the words in a charter-party, "to discharge with customary dispatch," as set forth in the opinion of the district judge in 10 FED. REP. 302, followed and adopted.

2. EVIDENCE OF THE WEATHER—UNITED STATES SIGNAL OFFICER'S RECORD.

As against all testimony given by witnesses as to the amount of rainfall, speaking of the weather without *memoranda* made at the time, the official record of the signal officer at this station, kept as a part of his official duty, is undoubtedly the best evidence on the subject.

Admiralty Appeal.

Joseph P. Hornor and Francis W. Baker, for libellants.

Charles B. Singleton and Richard H. Browne, for defendant.

PARDEE, C. J. The decision of this case in the district court, as reported in 10 FED. REP. 302, on the questions of law involved, is clear and, in my judgment, perfectly correct. As to the obligations of the charterers, arising under the stipulations of the charter-party, "to discharge with customary dispatch," I concur fully and adopt that decision.

On the facts I come to a different conclusion in regard to the actual rainfall, and the delays occasioned by rains. The cargo should have been discharged in five days. The ship arrived on Thursday, January 27th. Counting Friday, 28th, Saturday, 29th, Monday, 31st, Tuesday, February 1st, and Wednesday, February 2d, and the time for discharging had expired. The evidence offered by the respondents shows, outside of loose statements, such as "it rained nearly all the time," "there was much rain," etc., that there was no rain to hinder before Thursday, the third of February.

Courtault, discharging clerk for the respondent, who kept a memorandum of the discharging, speaks of no rain to hinder until Thursday.

As against all testimony given afterwards by witnesses speaking of the weather, without memoranda made at the time, the official record of the signal officer at this station is offered. The signal station is not over a mile from the ship landing, and the record having been kept by a scientific officer as a part of his official duty, is undoubtedly the best evidence attainable on the subject. This record shows 11.29 of an inch fall of rain on Tuesday, February 1st, and otherwise no rain at all from January 27th to February 5th, inclusive.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Making, then, the most extreme allowance for rain, of one day, and it is clear that the cargo should have been wholly discharged, if "customary dispatch" had been used, on February 3d. All delays after that date were the result of the negligence of the respondent, and whether it "rained or shined," was Sunday or week-day, he should pay demurrage for every day thereafter until the ship was discharged.

Libellant should have judgment for eight days demurrage, at 30 pounds sterling per day, according to contract. Let a judgment be entered in favor of libellants for the equivalent of 240 pounds sterling in United States currency, and \$97 for watchmen and tarpaulins, with 5 per cent. interest thereon from February 15, 1881, and costs of suit.

LINDSAY, GRACIE & Co. v. CUSIMANO.*

(Circuit Court, E. D. Louisiana. May 27, 1882.)

1. CHARTER-PARTY—CUSTOMARY DISPATCH.

When a charterer is allowed to select the wharf of discharge, but is bound to be ready to receive the cargo at the ship's side, and to discharge with customary dispatch, with stipulated demurrage, he is liable for delays caused by selecting a wharf already fully occupied.

2. CUSTOM.

To render a custom or usage of trade valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law. An alleged custom of the port of New Orleans, by which the cargo of a fruit vessel is commenced to be discharged for one day upon the wharf, and then the further discharging is delayed for one day to sell that part discharged, and then, if necessary, is further delayed another day to remove the same from the wharf, before proceeding to further discharge the cargo, condemned as unreasonable.

3. "CUSTOMARY DISPATCH IN DISCHARGING."

"Customary dispatch in discharging" means discharging with speed, haste, expedition, due diligence, according to the lawful, reasonable, well-known customs of the port of discharge. It is the same as "usual custom," but not the same as "quick dispatch," which latter has been held to exclude certain usages and customs.

4. EVIDENCE AS TO WEATHER—UNITED STATES SIGNAL OFFICER'S RECORD.

The record of the weather, kept by an officer of the United States signal service, is better evidence thereof than the testimony of witnesses who, having kept no record, afterwards swear to the state of the weather from memory.

Admiralty Appeal. On petition for rehearing.

For facts, see same case, 10 FED. REP. 302, and *ante*, 503.

Joseph P. Hornor and Francis W. Baker, for libellants.

Charles B. Singleton and R. H. Browne, for defendant.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE, C. J. The earnestness with which proctors for defendant have pressed for a rehearing in this case has induced me to go over the matter again and to amplify my reasons for judgment. The whole case rests upon the amount of time allowable under the contract for discharging the cargo of the Glenbervie.

The following are the specifications of the contract in relation to discharging:

"To discharge at a wharf as ordered by charterers' agents, or so near thereto as she may safely get, and there deliver the same agreeably to bills of lading.

"To discharge with customary dispatch, and shall pay damage at the rate of 30 pounds sterling per day," etc. See charter-party, Record, pp. 11, 12, 13.

"Simultaneously with the ship's being ready to unload the above-mentioned goods or any part thereof, the consignee of the said goods is hereby *bound to be ready to receive the same* from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein," etc. See bill of lading, Record, p. 281.

These provisions are inconsistent with any delay in discharging after the ship was ready, except such delays as are involved in customary dispatch. The defendant selected a wharf already occupied by the Caraidoc, and the Glenbervie landed outside. The defendant alleges that it was very difficult, if not altogether impracticable, to discharge the cargo of the Glenbervie over and across the decks of said vessel Caraidoc, and when the Caraidoc got out of the way, and the Glenbervie came to the wharf, "the wharf was then and there so much obstructed by goods and merchandise landed and being landed from other vessel or vessels, that it was not possible to unload the cargo of the steam-ship Glenbervie as is usual, customary, and proper at this port." These excuses are relied upon to justify a delay from January 27th to January 31st.

It seems perfectly clear to me that defendant had no business to select a wharf already fully occupied, (see 2 Low. 361;) and under his contract he was bound to be ready to receive the cargo as soon as the ship was landed and ready to deliver. He might have delayed the Glenbervie for weeks with the same excuses.

The case of *175 Tons of Coal*, 9 Ben. 400, is not applicable here, because in that case the contract specified the wharf, and there was no stipulation of the dispatch or delays to be used in discharging. The boat having agreed to unload at a particular wharf named, and being there detained only to await her regular turn, and there being no stipulation of dispatch in discharging, the libellants were not allowed to recover. Nor are the cases cited, that in cases where the

words "customary dispatch" were used in a charter-party a custom of allowing three days to procure a berth in the port of New York became a part of the contract, applicable here. See *Fulton v. Blake*, 5 Biss. 371. In this case there is no custom allowing a ship three days to procure a berth in the port of New Orleans alleged or proved. Besides, the *Glenbervie* found her landing immediately, and the consignee had agreed to be ready to receive simultaneously with the ship's being ready to deliver cargo; and he was to receive it on the ship's side.

In excuse for further delays the defendant, though not alleging in his answer, had offered evidence to show a custom in the fruit trade in the port of New Orleans to discharge cargo for one day on the wharf, and then delay one day to sell the same, and then, if necessary, another day to remove. Such a usage has been shown to prevail in this port for three or four years, but it is alleged in argument that it is now superseded, as interested parties have provided a suitable covered wharf. It never was a reasonable custom, even if it had acquired the authority of a custom at all, which is doubtful. "Customs result from a long series of actions constantly repeated, which have, by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent." La. Civ. Code, art. 3. "Custom is unwritten law, established, by common consent and uniform practice, from time immemorial." 2 Greenl. § 248. But waiving the question as to whether this practice of delay had attained, so far as usage is concerned, the dignity of a custom, it is sufficient to condemn it as unreasonable. That a ship should be delayed in discharging until the consignee can find purchasers for his goods, is to convert the ship into a temporary warehouse, according to the necessities of the consignee. "To render a custom or usage of trade valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law." 1 Wait, Act. & Def. 129, and cases there cited.

The case of *Smith v. Sixty Thousand Feet of Pine Lumber*, 2 Fed. Rep. 396, relied upon by proctors for defendant, goes only to the extent of restricting the discharge of cargo to such amount as the consignee can, with the use of ordinary facilities, according to the customs of the port, receive and take away. The contract in that case was for "customary dispatch in discharging," and the judge defined a custom to be "a practice which is universal, or almost universal, in the trade in question." In this case "customary dispatch in discharging" is qualified and affected by the stipulations in the

bill of lading. And here I may notice that not one of the many cases referred to by proctors for respondents is identical, in contract and circumstances, with this case, nor is there any conflict in principle with any of those cases in the views the district judge and I take of this case.

Our decisions can be maintained on principle, sustained by authority, if we concede this entire case to turn on the "customary dispatch" of the port of New Orleans. The lawful, reasonable, and well-known customs of the port of New Orleans affecting the contract in this case for customary dispatch, etc., are the customs not to discharge on Sundays, nor in the rain, and not any unreasonable practices allowing consignees delays to sell goods.

"Customary dispatch in discharging" I understand to mean discharging with speed, haste, expedition, due diligence, according to the lawful, reasonable, well-known customs of the port of discharge. It is the same as usual dispatch, not the same as quick dispatch, which latter has been held to exclude certain usages and customs. *Davis v. Wallace*, 3 Cliff. 123; *Thacher v. Boston Gas-light*, 2 Low. 362; *Keen v. Audendried*, 5 Ben. 535.

With regard to the time allowed in this case for rain, it is urged that I ought not to have considered the testimony of the United States signal officer as the best evidence to be had.

I only put the evidence of the signal officer as the better evidence when opposed to those witnesses who, having kept no record, some time afterwards swore to the state of the weather from memory, and I think there can be no doubt of the correctness of this position. Proctors for the defendant, or else I, mistake the effect of the signal officer's testimony, for it was on his record that I allowed one day for rain.

The testimony for respondent does not reliably show any rain before Thursday, by which time the cargo should have been fully discharged. Courtauld, discharging clerk, swearing from his book, mentions no rain before Thursday. The ship's mate, testifying with the ship's log before him, says it rained on Tuesday. This is in corroboration of the signal officer. And not another single witness that I discover swears by recollection to rain on any particular day before Thursday, and the evidence generally of all such witnesses in this case is abuse of the weather.

The application for a rehearing is denied.

CARGO FROM WRECK OF BARK EDWARDS.

(District Court, S. D. Florida. April, 1882.)

1. SALVAGE—DERELICT—COMPENSATION—EXTRAORDINARY MERIT.

Salvage on derelict property is not limited to a moiety, as high as 70 per cent. being given in a case of extraordinary merit, where the labor is considerable and the value of the saved property small.

2. SAME—SHIPWRECKED PROPERTY.

Such damage as results to property from being shipwrecked and submerged in salt water, with breaking and loss of boxes and cases, held not to so change its condition as to exclude it from free entry, if shown to be products or manufactures of the United States, under provisions of section 2505 of the Revised Statutes.

3. SAME—IDENTITY OF PROPERTY.

The identity of such articles must be established in conformity with prescribed regulations of the treasury department, and not by ordinary testimony.

In Admiralty. Salvage.

L. W. Bethel, for libellants.

G. Bowne Patterson, Dist. Atty., intervening for duties.

No claimant.

LOCKE, D. J. This property was found in the bottom of a bark which had been wrecked on Alacran reef, abandoned and gone to pieces. It was saved by diving by naked divers, in from two to two and a half fathoms of water, and boated some seven miles, to where the salving vessel had been obliged to anchor; has been brought to this port over 500 miles and libelled for salvage by the salvors, who are licensed wreckers of this district.

It appears to have been derelict in the fullest sense of the term, and its total loss certain, except by some such undertaking as the libellants engaged in. The labor was severe and to a certain extent dangerous, both to the persons and property engaged, the services being rendered in uncertain weather, and on an open, exposed, and dangerous reef. The actual diving and labor occupied about a week of extra-long days, while the value of the property saved, compared with the labor of saving it, is small, being, after payment of expenses and duties, but about \$700.

The ancient rule of giving a moiety for salvage in cases of derelict, and limiting it to that proportion of the value saved, has gradually given way to one which has been generally accepted as more equitable and just, namely, a fair compensation for actual services rendered and labor performed, although it may exceed a moiety, and, when the amount justifies it, a liberal bounty in addition.

The records of this district show numerous instances where it has

been considered that a moiety would not reward the salvors as they deserved, and higher rates been given: 60, 70, 75, and even as high as 90 per cent. has been awarded in some instances where the property has been seemingly lost, the value comparatively small, and the labor proportionately large. I am well aware that these rates, as compared with those given by other courts, may seem unjustly large; but when I consider that the services are rendered by persons who are specially licensed and under obligations not only to go to the relief of all property in distress without stopping to consider whether it will be remunerative or not, but also to surrender and report to this court all derelict property found by them, of howsoever little value, and the honesty with which these obligations are fulfilled, I am not satisfied that the rates heretofore given under such circumstances as the present have been any too large; compensation for actual work and labor being the first point for consideration in awarding salvage, as well as in determining payment for any other services.

It is true that in rendering a salvage service the salvor assumes the risks of failure, and his salvage depends upon his success and the amount of property saved; yet when there is enough to fully compensate him for time and labor, and leave a reasonable proportion for the owner, he should certainly be awarded that, if the amount will allow no more.

I consider some of the circumstances in this case of unusual merit, and do not think a moiety sufficient to pay the salvors for their time, labor, exposure, and risk, while for any residue the owner may finally receive he will be indebted to their exertions, and 70 per cent. of the net proceeds of sale, after payment of all costs, expenses, and duties, will be allowed.

A petition has been filed by the United States attorney, intervening for duties, amounting to \$426.12, alleging that the articles being derelict are *prima facie* dutiable, while the libellants claim, and have endeavored to show by marks and the character of some of the articles, that they were of the manufacture of the United States, and therefore not subject to duties. The property all having been for some time under water was considerably damaged, and the packages, boxes, and cases in many instances destroyed, so that the district attorney denies that it was, "in the same condition" in which it was shipped, even admitting that it was the product of the United States. What construction is to be placed upon this term, "in the same condition as exported," as used in the acts of 1861 and 1870, and embodied into section 2505 of the Revised Statutes, is a question upon

which there might be a difference of opinion, and which I have been unable to find has been judicially decided. Several decisions of the treasury department have been made upon it, but no rule of determination has, as far as I can ascertain, been fixed. In decision 2,252, several organs which had received damage in the sea voyage were permitted to entry duty free; as was also damaged powder which had been rendered worthless by the absorption of moisture, decision 2,755; also worn-out car wheels, 4,239; but the materials of an iron bridge which had been erected but swept away by a freshet before being used, and so damaged as to prevent its being used for the same purpose again, decision 2,493; steel engravings exported to receive the autograph of the artist, decision 4,105; and hoop-iron which had been used as cotton ties, decision 2,525,—were held to be liable to duties upon reimportation.

In market, if for sale, none of these articles would be considered to be in the same condition in which it is presumed they were shipped; but I cannot believe it the intention of congress to exclude articles on account of any damage either by usual and ordinary means or extraordinary circumstances which has not changed their character as to their uses and employment. The act of March 2, 1799, that permitted the reimportation of the produce of the United States made no exception on account of its condition, and I do not understand that the amendment of 1861 was with the intention of reaching cases of ordinary or even extraordinary damage by sea voyage or shipwreck, whereby the character, nature, or possibility of use might not be changed, but was intended rather to apply to those raw products, the character of which may have been entirely altered as to their value and use.

In this case not one of the articles—cotton goods, axes, hatchets, wire fencing, shot, etc.—have been so changed that they are not suited for the purposes originally intended, or are suited for any others. The packages, boxes, and original wrappings, when considered in this connection, become a matter of so small importance that I do not think that their total destruction could be held to affect the question of the condition of the property, if otherwise unchanged. It may be true that wheat in bulk may not be in the same condition as wheat in bags, or cotton loose, as that in bales, but the change in condition I consider too slight to be reached or intended by this statute. I do not think in this case the damage to the property by being under water, and by the breaking and destruction of the boxes and packages, has so changed its condition as to render it liable to payment

of duties if otherwise shown to be entitled to free entry. But, while not liable to duties, when the identity of the articles is properly established this must be done under regulations prescribed by the secretary of the treasury. This is a condition upon which the property may be admitted duty free, and no other testimony as to the origin, character, or shipment of the goods can entitle them to claim this benefit. The proof of identity must be made in the manner directed by the regulations of the treasury department, (articles 375 and 376,) as far as the circumstances possibly permit. The property apparently never having been landed in a foreign port, it will be impossible to furnish the statement required in article 377, which will not, therefore, be required.

Time will be allowed the parties to make such proof as the regulations require, not exceeding six months—the time given in the form of bond prescribed,—and in the mean time the entire amount of duties claimed will be retained in the registry of the court.

THE JOHN MITCHELL.

(District Court, E. D. New York. 1882.)

1. COLLISION—CROSSING COURSES—MANEUVER IN EXTREMIS.

Where it was not possible for a pilot-boat, by holding her course and beating out her tack, to cross the bows of a tug without collision, she is justified in attempting at the last moment to avoid the collision by keeping away, and her failure to accomplish this is no fault.

2. SAME—CHOICE OF MANEUVERS.

Where it was doubtful whether she could have accomplished such a maneuver in safety, it is no fault to decline crossing the hawser between the tug and her tow.

3. SAME—ERROR IN EXTREMIS—NOT A FAULT.

A mere error in the selection of means to avoid a danger cast upon a vessel by the fault of the other vessel would not render the erring vessel responsible for the result.

Hill, Wing & Shoudy, for libellant.

Chas. W. Sloane and Beebe, Wilcox & Hobbs, for respondent.

BENEDICT, D. J. This action is brought to recover of the tug John Mitchell and the pilot-boat Alexander M. Lawrence damages for a collision with the bark ———. The place of collision was in the bay of New York, just above the Narrows. The tug was towing the bark in from sea, on a hawser, intending to stop off the boarding station. The tide was flood, and the wind from the southward. The pilot-boat was beating down the bay. On her port tack she crossed the bows of

the tug, standing in to the Staten island shore. The tug, after the pilot-boat had passed her bows, turned about in order to stop head to the tide, swinging toward the Staten island shore as she turned, and the bark followed her upon the swing. The bark, meanwhile, beat out her tack at the Staten island shore, and when in the act of falling away upon the starboard tack found the tug then heading down the bay, almost directly in her track, with the bark still on the swing. The tug then stopped and hailed the pilot-boat to go across the hawser by which the bark was being towed, and between the tug and the bark. Instead of doing so, a pilot on the boat seizing the wheel put it hard up, with the intention of keeping the pilot-boat off, so as, if possible, to clear the bark to the westward. But the time was not sufficient, and the pilot-boat came in collision with the bark on her port side.

It is manifest from this statement of facts that the tug when she undertook to turn around, the pilot-boat being then about to tack between her and the Staten island shore, took the risk of keeping out of the course of the pilot-boat as she came out of her starboard tack, and at the same time had the right to rely upon the pilot-boat's beating out her tack, and holding her course after she came on the starboard tack. It is conceded that the pilot-boat beat out her tack. The case turns, therefore, upon the question whether the pilot-boat, by holding her course upon the starboard tack, could cross the bows of the tug. The testimony for the tug shows that it was not possible for the pilot-boat to cross the bows of the tug without collision. She was, therefore, justified in attempting, at the last moment, to avoid collision by keeping away; and her failure to accomplish this was no fault. Neither was it a fault to decline to attempt to cross the hawser between the tug and the bark. It is at least doubtful whether she could have accomplished such a maneuver in safety. But, whether feasible or not, the maneuver was one not by any means obligatory upon the pilot-boat. Having been placed in a position of immediate peril by the fault of the tug in getting upon her course, it was the right of the pilot-boat to judge what it was best for her to attempt; and if it were true that she erred in the selection of means to avoid a danger cast upon her by the fault of the tug, such an error would not render her responsible for the result. It is plain, therefore, that the tug is liable for the danger caused to the bark; and she is the only one responsible, for the bark had nothing to do, and did nothing, but to follow in the course prescribed for her by the tug.

There must be a decree in favor of the libellant against the tug; and the libel as against the pilot-boat must be dismissed, with costs.

PETERS v. LINCOLN & N. W. R. Co. and others.

(Circuit Court, D. Nebraska. May, 1881.)

RAILROAD—LEASE OF—STATUTE CONSTRUED.

Where the language of the statute is that no lease of one railroad by another shall be perfected "until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, either in person or by proxy, voting thereat shall have assented thereto," the stockholders' meeting, and the vote in such meeting upon the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form; and their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one.

In Equity. On demurrer.

E. Wakeley, for complainants.

T. M. Marquett, for respondents.

McCARY, C. J. The bill does not allege that the agreement to lease was assented to by the stockholders of either of the companies, in stockholders' meeting assembled, as required by the statute; but it is insisted that it does show such assent in fact, and that the provisions of the statute requiring a meeting of the stockholders, and a vote upon the question at such meeting, may be regarded as directory only, and not mandatory. The language of the statute is that no lease of one railroad by another shall be perfected "until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company, represented at such meeting, either in person or by proxy, voting thereat, shall have assented thereto."

Can the meeting, and the vote at such meeting, be dispensed with, on the ground that the assent of the stockholders has been expressed in some other mode?

The distinction between things which are of the essence of the act required by the statute to be done, and those which are not of the essence, is recognized. *Marchant v. Langworthy*, 6 Hill, 646; *Rex v. Loaxdale*, 1 Burr. 447; *Dwarris*, Statutes, etc., 222.

Such provisions of a statute as relate to the former are mandatory; but such as relate to the latter, as, for example, to matters of form, or time and manner, and not appearing essential to the judicial mind, may be regarded as directory only.

The legislature has seen fit to provide that no lease of a railroad in this state, executed by one railroad company to another, shall be completed until a meeting of the stockholders of both companies shall have been called by the directors thereof, nor until such lease has been assented to by the votes of at least two-thirds of the stock represented. In our judgment the stockholders' meeting, and the vote in such meeting upon the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form. The legislature, for reasons which readily suggest themselves to us, thought fit to prohibit the leasing of railroads by one railroad company to another, without the deliberate consideration of the question by the stockholders in meeting assembled, and without a formal expression of opinion by vote at such meeting. It is well known that a very common mode of combining and consolidating different lines of railroad is by lease executed by one company to another. The policy of the legislature was undoubtedly to put certain limitations upon such consolidations, by providing for a consideration of the question, in each case, by the stockholders in their corporate capacity. For the purpose of deciding such a question, the stockholders, when assembled under the law for deliberation, represent and act for the corporation. Their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one. The rule is well settled that where the board of directors of a corporation is authorized to act upon a subject, that action must be had by the board in its organized capacity, and not by the individual members outside of a board meeting.

When the powers of the corporation upon any given subject are to be exercised by the stockholders in meeting assembled, and by vote at such meeting, it is plain that the same rule prevails. The action of such stockholders outside of such meeting is individual action only. It is not such action as the law requires. It does not bind the corporation. Many reasons might be suggested in support of such a rule. As intimated above, it may have been for the purpose of placing limitations upon the power of combination and consolidation between different lines of railroad, thus encouraging competition.

It is, perhaps, enough in the present case to say that the statute has, in plain terms, required the stockholders' meeting and the vote by two-thirds of the stock represented at such meeting. The meeting and the vote are not matters of form, but they are the very things which the statute requires. But it may be further suggested that the statute was doubtless framed with a view to secure deliberation upon

the question in each case. The value of discussion, of a comparison of views, of a hearing in open debate on all sides, and of a fair vote in open meeting, after such consideration, cannot be questioned. If, for example, it were conceded that the meeting and the vote were non-essential, and that the assent of the stockholders, however secured, would be sufficient, it is easy to see that in every case of doubt the policy of appealing to the stockholders, individually and separately, and securing their assent when only one side of the question is presented, would be adopted. Experience teaches that signatures obtained to an assent in this way might not represent the interest of the stockholders, and that upon a hearing and discussion of the question in open meeting a very different result might be reached. These are probably some of the reasons which influenced the legislature to enact the statute in question. Certain it is that the statute, in our judgment, establishes a wise public policy, and must be upheld and enforced by the courts, and under it the proposition to lease, set out in the bill, does not amount to a valid contract which can be specifically enforced.

If the complainants were injured by the representations made by the board of directors of the Atchison & Nebraska Railroad Company, in the circular of June 24, 1879, it may be that they have a right of action to recover their damages. All that is determined now is that the bill does not show a binding contract for a lease between the two companies, and for this reason the demurrer is sustained.

DUNDY, D. J., concurs.

DODGE and others v. SCHELL.

(*Circuit Court, S. D. New York.* June 15, 1882.)

SUBSTITUTION OF ATTORNEYS—LIEN ON JUDGMENT FOR SERVICES.

An agreement was entered into by plaintiffs, by which a party, since deceased, was employed to prosecute their claim against the government for alleged illegal exactions of duties and fees, which, during his life-time, he proceeded to do, employed attorneys, instituted the suit, and paid all the expenses of the proceedings, and, after his death, his executrix assumed control, substituting attorneys and paying all expenses, and finally recovered judgment in favor of the plaintiff. *Held*, that the services of deceased were in the nature of attorney's services, and that the long acquiescence of 13 years in the control of proceedings by deceased and his executrix entitles the executrix to a lien on the judgment and that plaintiffs' motion to substitute their attorney be granted on payment to the executrix of one-half of the amount of the judgment, the amount specified in the contract.

John E. Parsons, for the motion.

W. N. Cromwell, contra.

WALLACE, C. J. This is a motion by plaintiffs to vacate an appearance by an attorney in their behalf as authorized. The attorney does not dispute the plaintiffs' right to substitute another attorney in his place, but insists they should not be permitted to do so until they fulfil their obligations to one whom the present attorney immediately represents. Prior to 1864, Phelps, Dodge & Co., the plaintiffs, made an agreement with one Douglass, by which they employed the latter to prosecute a claim of theirs against the government growing out of alleged illegal exactions of duties and fees. By this agreement Douglass undertook to "endeavor to establish the claim by legal decisions or otherwise." He was to be paid for his services a sum equal to one-half of the recovery, and was to bear all the costs and expenses of the proceedings. In 1864 he employed attorneys, and brought suit in the name of the plaintiffs against the collector of the port of New York. From that time until 1876, when he died, he had the exclusive control of the suit. Substitutions of attorneys had been made by him, and he had defrayed all the expenses. After his death his executrix assumed control of the suit, and under her administration the present attorney was substituted as plaintiffs' attorney, and a judgment for \$17,498 recovered for the plaintiffs. Until this judgment was recovered the plaintiffs took no part in the proceedings, and apparently manifested no interest therein. Their first intervention in the suit was an effort to wrest its control from the executrix. A motion was made, ostensibly by the defendant in the suit, but apparently at the instigation or in the interest of the plaintiffs, to vacate the appearance of the attorney substituted by the executrix upon the ground that the agreement between plaintiffs and Douglass was champertous and void, and, if not, because the executrix had no power to appoint an attorney for the plaintiffs. This motion was heard before my predecessor in this court and denied. Notwithstanding this the plaintiffs succeeded, through the co-operation of the defendant's attorney, in ejecting the attorney from the suit during its pendency upon a writ of error from the judgment. Upon the affirmance of the judgment, however, when they applied to enter the mandate in this court, the clerk of this court refused to recognize the right of any attorney to appear for them except the present attorney. Hence this motion. The plaintiffs now insist that their contract with Douglass was one for his personal exertions, and by his death before entire performance they are released from all

obligations to his executrix; that his interest did not survive his death, and his executrix was not authorized to assume charge of the suit and appoint the present attorney.

That the executrix of Douglass has a valid claim against the plaintiffs for the value of his services up to the time of his death, the entire performance of the contract on his part being prevented by his death, is established by many authorities, among which are *Wolfe v. Howes*, 20 N. Y. 197; *Spalding v. Rosa*, 71 N. Y. 40, cited in the brief of plaintiffs' counsel. It is more doubtful whether the executrix, upon Douglass' death, had the right to control the further prosecution of the action. But after she was permitted to do so by the plaintiff for a considerable period of time, and by her exertions and at her expense the judgment was obtained which the plaintiffs now seek to control, the objection to her conduct seems an ungracious one, and should not be willingly enforced. The question of her authority to appoint the attorney must have been passed upon by Judge Blatchford on the former motion to vacate the appearance, and been determined affirmatively; otherwise the motion would have prevailed. Whether this authority was held to be within the scope and contemplation of the original contract between plaintiffs and Douglass, or to be implied from the subsequent conduct of the parties, does not appear; nor is it material now. It suffices that there are no clamorous equities in the present application to urge a reconsideration of that adjudication. For 13 years the plaintiffs acquiesced in what was done by Douglass and his executrix, but from the time they ascertained that a large judgment had been recovered, they have seemingly been unwilling to recognize the agreement. They now present affidavits in which, upon information and by innuendo, they impute fraudulent conduct to Douglass, not towards themselves, but towards the government. They claim the judgment would not have been affirmed upon the writ of error except for the exertions of counsel employed by themselves; but it appears that competent counsel were employed by the executrix and ignored by the plaintiffs. They represent themselves willing to pay a reasonable compensation to the executrix; but at the same time they are insisting they are under no legal obligation, and they have made no definite proposition of payment.

Notwithstanding all this the plaintiffs have the right to collect the judgment themselves, and for that purpose to appoint such attorney as they desire. They did not transfer the cause of action to Douglass, nor did the agreement effect an equitable assignment to Douglass of half the proceeds of the suit. The suit now being at an end,

the executrix has no interest in controlling its further disposition. She has, however, the right to assert any lien upon the judgment which exists by virtue of the agreement, and the service rendered under it. If Douglass had been an attorney the agreement and services would have created a lien. There is no magic in the name attorney which conjures up a lien. It is the nature of the services and the control, actual or potential, which the mechanical or professional laborer has over the object intrusted to him which determine whether a lien is or is not conferred. The services which Douglass was employed to render and did render were in character attorney's services. As he appointed and discharged attorneys, he had through them the same control over the suit as he would if he had been an attorney himself. It is said by *Best, C. J.*, in *Jacobs v. Latour*, 5 Bing. 130: "As between debtor and creditor the doctrine of lien is so equitable it cannot be favored too much." The remark is peculiarly applicable in the present case.

It would not be proper to determine now, or by any proceeding which cannot be reviewed the amount of the lien to which the executrix is entitled. But for present purposes it should be held that she is not to be turned over to a suit at law, to receive that measure of compensation at the end of litigation, to which she is entitled now before surrendering her lien. It may be the plaintiffs have equities and legal rights with which the court has not been impressed, and from which they should not be definitely precluded by the present decision. It may ultimately appear that the executrix should not receive the whole compensation contemplated by the agreement, but the burden should rest upon the plaintiffs, who are seeking to dispossess her of a lien, to show that she is not entitled to the sum which they promised to pay when their claim should be established.

It is therefore ordered that the plaintiffs' motion be granted upon the payment to the executrix of Douglass of one-half of the amount of the judgment, without prejudice to the right of the plaintiffs to recover at law if they can show themselves entitled to the whole sum, or such part thereof as may be just.

ATTORNEYS LIEN ON JUDGMENT. See, generally, *Andrews v. Morse*, 12 Conn. 444; *Carter v. Davis*, 8 Fla. 183; *Young v. Dearborn*, 27 N. H. 324; *Currier v. Boston, etc.*, R. Co. 37 N. H. 228; *Pinder v. Morris*, 3 Caines, 165; *Ten Broeck v. De Witt*, 10 Wend. 617; *Martin v. Hawks*, 15 Johns. 405; *Power v. Kent*, 1 Cow. 172; *Walker v. Sargeant*, 14 Vt. 247; *Heartt v. Chipman*, 2 Aiken, 162; and compare *Cragin v. Travis*, 1 How. Pr. 157; *Noxon v. Gregory*, 5 How. Pr. 339; *Frissell v. Haile*, 18 Mo. 18. *Contra, Hill v. Brink-*

ley, 10 Ind. 102. It does not arise till judgment. *Potter v. Mayo*, 3 Me. 34; *Getchell v. Clark*, 5 Mass. 309; *Sweet v. Bartlett*, 4 Sandf. 661; *Foot v. Tewksbury*, 2 Vt. 97. See *Casey v. March*, 30 Tex. 180. Nor does it cover all compensation which may be due by special agreement, (*Ex parte Kyle* 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal. 507; *Wright v. Cobleigh*, 21 N. H. 339; *Wells v. Hatch*, 43 N. H. 246; *Phillips v. Stagg*, 2 Edw. Ch. 108. Compare *Dennett v. Cutts*, 11 N. H. 163; *Fowler v. Morrill*, 8 Tex. 153;) and is limited to specific fees or disbursements taxed as costs, and included in the judgment. *Humphrey v. Browning*, 46 Ill. 477; *Rooney v. Second Av. R. Co.* 18 N. Y. 368; *Warfield v. Campbell*, 38 Ala. 527; *Forsythe v. Beveridge*, 52 Ill. 268. An attorney cannot obtain a lien on a decree rendered in a probate court on a guardian's final settlement. *McCa v. Grant*, 43 Ala. 262. The lien is waived by procuring satisfaction of the judgment, and perfecting the client's title to land attached in the action. *Cowen v. Boone*, 48 Iowa, 350. An attorney cannot obtain a lien under the Oregon Code unless he has a special agreement as to the amount. *In re Scroggin*, 5 Sawy. 549. Lien on substitution of attorney. See *Carver v. U. S.* 7 Ct. Cl. 499; *Sup'rs v. Broadhead*, 44 How. Pr. 411; *Id.* 426; *Leszynsky v. Merritt*, 9 FED. REP. 688.—[ED.]

LAFITTE v. SHAWCROSS.

(Circuit Court, E. D. Louisiana. January, 1882.)

1. UNILATERAL CONTRACT—EVIDENCE.

Parol evidence is admissible to prove the consideration of a unilateral contract made in writing against the person seeking to enforce the same.

2. SAME—PRESUMPTIONS.

When a written contract is confined to one undertaking by one party, although a presumption arises, in the absence of proof to the contrary, that the parties expressed the whole of their intentions in respect to the subject-matter, yet that presumption may be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a mere general agreement; or it may be shown that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. Where a written contract expresses no consideration, a consideration may be proved, even when it consists of a distinct contemporaneous verbal undertaking.

Carleton Hunt and *C. H. Larillebeuvre*, for plaintiff.

B. F. Jonas, *I. S. Hyams*, and *D. C. & L. L. Labatt*, for defendant.

BILLINGS, D. J. In this case the plaintiff had been the agent of the defendant in the purchase of cotton. His commissions ordinarily had been $\frac{1}{2}$ per cent. upon the purchases. To recover these commis-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

sions upon that basis this suit is brought. It appeared in evidence that some difference existed between the plaintiff and defendant as to what the commissions should be for the months of September, October, and November, 1880, and that on the eighteenth day of November the plaintiff handed to the defendant the following letter, signed by him:

"NEW ORLEANS, 18th November, 1880.

"*R. Shawcross, Esq.*—DEAR SIR: Having conversed with you this A. M. upon your business, I will agree to charge you only three-eighths of 1 per cent. on all business done during the months of September, October, and November, 1880.

"I am very truly yours,

JAMES A. LAVITTE."

This letter having been pleaded as a remission of all beyond the $\frac{3}{8}$ per cent., and its writing and delivery having been admitted by the plaintiff, he offered to introduce parol evidence tending to show that during the conversation in which the agreement, as evidenced by the letter, was made on his part, and as the consideration of the same, the defendant agreed to continue him as his agent, which last agreement the defendant had violated. The court excluded the evidence, and judgment was given for the defendant, with leave to the plaintiff to move for a new trial at the present term.

The question is, can a party who executes a unilateral contract in writing, which does not recite the consideration, prove that the consideration of the contract was another and distinct verbal agreement or undertaking on the part of the person seeking to enforce the written contract?

I shall first consider the question in the light of the common-law authorities. The rule is universal that parol evidence is not permissible to contradict or vary the terms of a written instrument; but when, as here, the writing is confined to one undertaking by one party, although a presumption arises, in the absence of proof to the contrary, that the parties expressed the *whole* of their intention in respect of the subject-matter, yet that presumption may be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, or it may be shown that a parol contract was made independently, wholly collateral to, and distinct from, a written one made at the same time, Starkie, Ev. part 4, marginal paging 1049 and 1050. The case cited in the note is *Russell v. Dunskey*, 6 Moore, 233, where there was a written adjustment under a policy of insurance, and parol testimony

was admitted of a contemporaneous agreement to refund. The rule in England is well stated by Chief Justice Erle, in *Lindley v. Lacey*, 17 Com. B. 586, (112 Eng. Com. Law,) as follows:

"If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there; but if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced."

In *Tisdale v. Harris*, 20 Pick. 9, where the plaintiff had given a written agreement to buy property, the court admitted parol evidence to show upon what conditions the defendant was to sell.

In *Campbell v. McClenachan*, 6 S. & R. 171, the court held that parol evidence may be given of what passed between the parties at and immediately before the execution of a written instrument by one party, where a verbal promise made by the other party induced him to execute the instrument.

In *The Alida*, 1 Abb. Adm. 179, Judge Betts, after a consideration of the authorities, lays down the principle to be that the written instrument was binding, so far as it went; but that, as to such parts of the contract as were not embraced within the writing, parol evidence was admissible.

In *Potter v. Hopkins*, 25 Wend. 417, the court say: "Where a contracts rests part in writing and part in parol, oral proof is admissible to supply the deficiencies in the part written, if the contract be of such a nature as is not required to be in writing."

I think that it is clear from these authorities that, at the common law, the testimony is admissible.

The decisions in Louisiana are but an exposition of article 2276 of the Civil Code of Louisiana, which provides as follows: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them, nor since." The rule thus laid down has been rigidly enforced in *Lynch v. Burr*, 7 Rob. (La.) 100; *Henderson v. Stone*, 1 Martin, (N. S.) 641; *Gould v. Bridgers*, 3 Martin, (N. S.) 692; *Wilson v. Phillips*, 4 La. Ann. 159; *Macarty v. Gasquet*, 11 Rob. 275; and in *Selby v. Friedlander*, 22 La. Ann. 381.

It is difficult to reconcile these cases with *Klein v. Dinkgrave*, 4 La. Ann. 540; *Delabigarre v. Second Municipality*, 3 La. Ann. 235; and *Saramia v. Courrege*, 13 La. Ann. 25. These last three cases hold

that parol testimony may be introduced to show, as between the parties, the cause (*i. e.*, the consideration) of the contract, even when they add to its terms. See, also, the views of the court in *Robertson v. Nott*, 2 Martin, (N. S.) 125.

What the plaintiff here asks to prove is the consideration, which was a separate undertaking. A careful study of all the authorities would lead me to the conclusion that if the consideration had been expressed in the written papers, under our law nothing could be added to the writing. But as no consideration is expressed, and the letter purports to be and is pleaded as a remission of a portion of a claim to ascertain whether it be operative, the court must ascertain whether it was in fact founded upon a consideration; for, according to Civil Code, art. 1893, an obligation without a cause can have no effect. Though an agreement may be valid without any expressed cause, a sufficient cause must be shown to exist or the letter would be of no effect. This necessitates the admission of the evidence as to the consideration of the promise or remission contained in the letter.

A new trial must, therefore, be granted.

UNITED STATES *v.* NICHOLSON.

(*District Court, D. Oregon.* June 14, 1882.)

SPACE APPROPRIATED TO PASSENGERS.

A space upon a vessel bringing passengers into the United States, under the act of March 3, 1855, (10 St. 715; section 4252, Rev. St.,) is not "appropriated" to their use within the meaning of the term, or the object and policy of the statute, unless it is given up to their *exclusive* use; and therefore the dining saloon of a steamship carrying Chinese passengers from Hong Kong to Portland, Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use.

Information for Violation of Passenger Act.

J. F. Watson, for plaintiff.

John W. Whalley, for defendant.

DEADY, J. On March 29, 1882, the British steam-ship *Glenelg* sailed from the port of Hong Kong with Chinese passengers for this port, and arrived at Astoria with them on May 7th.

On May 20th the district attorney filed an information against the defendant, charging him, as master of said vessel, with a violation of

section 4252 of the Revised Statutes, by taking thereon and bringing to Oregon 105 more passengers than he was entitled to carry in the space appropriated to them.

The passenger list contains the names of 615 persons, 9 of whom are described as "boys," although ranging from 11 to 13 years of age. This list also contains the names of 23 Chinese, alleged to be, on the ship's "articles," to-wit: One interpreter, 3 stewards, 4 doctors, and 15 cooks. In the case of the master of the British steamship *Anerly*, lately tried in this court, it was claimed that a similar lot of persons were not to be reckoned as passengers, but as a part of the crew, because their names were put on the ship's articles. But the test is, not where were their names, but what space did their bodies occupy? If they occupied the space appropriated to passengers, they are either passengers, or diminish the space appropriated thereto in proportion to their number. The result is the same in either case.

Whether the putting of these cooks, doctors, etc., upon the articles is a mere device to evade the law, or a convenient contrivance to bring them under the discipline of the ship in the discharge of their duties towards their countrymen, is immaterial. As long as they occupy the space allotted to passengers, they are, nevertheless, to be counted as such. In the case of the *Anerly* they were held to be passengers, and the contrary is not claimed in this. Neither were there any "boys" on the list in the sense of the passenger act, which allows two "children," "over one and under eight years of age," to be counted as one passenger. Section 4252, Rev. St. Therefore it must be considered that the vessel carried 638 passengers.

By the Hong Kong emigration officer's certificate, the vessel was entitled to take on 638 adult passengers, and it appears from the same that she had on board when she sailed 628 adults and "10 male children" between the ages of 1 and 12. By the measurement of the surveyor of the port of Hong Kong, made under the American act, she was entitled to carry 635 passengers; and by the measurement of the inspector at Astoria she might have carried, in the spaces measured for passengers at Hong Kong, 645 persons. But said inspector also found, and it is now so admitted by the defendant, that the after space on the "'tween-decks," which was measured for 45 passengers, was filled with ship's stores; and also that the after saloon on the main deck, which was measured for 57 passengers, was not appropriated to their use; and this latter is the point in dispute.

The law provides, (section 4252, Rev. St.,) "the spaces appropriated" for the use of passengers shall not be otherwise occupied except with their "personal baggage," and on the main deck shall be in the proportion of "16 clear superficial feet of deck" for each passenger. The term "appropriate" is derived from the Latin, *ad* and *proprius*, and signifies "to take as one's own by exclusive right." Worcester. Dict. A space, therefore, is not "appropriated" to the use of passengers so long as any one else is allowed the use of it also. This is the literal meaning of the word, and the evident sense in which it is used in the statute.

Three measurements of the space in the saloon have been offered in evidence—the one made at Hong Kong, giving it a capacity for 57 passengers; the one made at Astoria, for 67 passengers; and one made here by a competent person, Mr. Henry L. Hoyt, for 72. None of these measurements are official. Congress has not provided that any particular person shall make the survey, except the one made by the inspector upon the arrival of the vessel in the United States, and then the report of such survey is only *prima facie* evidence of a compliance with the law when approved by the collector. Section 4264, Rev. St. The inspector did not find that the law had been complied with, and there is no such report in the case. It is the duty of the master to know how many passengers his vessel can carry, or how many can be carried in any particular space on it, and to see that the provisions of the statute are complied with. *The Anna*, Taney's Dec. 559; *U. S. v. Morton*, 1 Low. 179. And if there is a dispute as to the measurement the court must decide it upon the evidence. In the mean time the law casts the responsibility upon the master, and if he allows his owners or charterers to overload his vessel he must take the consequences. But it is not necessary to decide between these conflicting measurements, because upon the evidence it is clear that the space in this saloon was never "appropriated" to the use of any of the passengers upon this vessel.

The burden of the vessel is 894.74 tons, and she was built for carrying first-class passengers. This was the dining saloon, and elegantly furnished. It contained four dining tables, from 12 to 14 feet in length, when drawn out; a cushioned seat ran around the sides, from which the velvet cushions were removed during the voyage. The master and his officers took their meals there, and the master's cabin was an enclosure at one end of it and opened into it. After the first few days out from Hong Kong, and when the passengers began to recover from seasickness, they came on the main deck

for exercise, and some of them were in the habit of going into the cabin daily during the cold weather and warming themselves at the stove; and on some occasions some of them laid down on the floor near the same.

The defendant, who appears to have been very kind and considerate with the passengers, directed the steward to let them have the run of the ship, and he often sat in the saloon and talked with parties of them who could speak some English, particularly after the vessel broke her shaft, which she did about 100 miles from this shore; and sometimes entertained them by playing on the piano or harmonium. But no particular passengers were ever assigned to this space; nor did any passenger eat or sleep there during the voyage; and if any were present when the officers sat down to their meals they respectfully retired.

This is the case upon the testimony of the defendant; and it is evident that this space was not appropriated to any 57 or other number of these Chinese passengers. Probably not more than 10 of them were ever in there at once, and seldom so many. None of them were berthed or allotted there; and the fact seems to be that when taking exercise on the main deck, as they were entitled to, they simply had the privilege of lounging in the saloon more or less during the day. But the inspector who surveyed the vessel and counted the passengers testified that the chief officer, who showed him around the vessel, told him that the saloon was not "used" by the passengers, and his two assistants testify that they were present and heard the conversation. At this time the master was on shore, and objection was made to the admission of the mate's declarations in his absence. But the mate was in the master's place for the time being, and his declarations while pointing out the spaces occupied by the passengers, concerning that matter, I think are a part of the *res gestæ*, and therefore competent. But, be this as it may, the case is clear against the defendant upon the evidence introduced by him.

As was said by Mr. Chief Justice Taney in *The Anna*, *supra*:

"There is certainly nothing in the object and policy of the law to induce the court to restrain the operation of this clause of the statute within narrower limits than its language naturally and justly imports. Before congress legislated upon the subject, the transportation of passengers to this country was, in many instances, conducted in a manner that shocked the moral sense of the community. The ships were crowded to excess; the places allotted the passengers not ventilated; and they were often, during the voyage, fed upon unwholesome food, or restricted to a very scanty allowance. The natural result was that ships were constantly arriving with contagious and infectious

diseases on board; and, after having lost on the voyage a great portion of the passengers, brought the survivors into the country so emaciated with disease as to become a public burden, and often introducing contagious and infectious maladies contracted on shipboard, endangering thereby the health and lives of our own citizens."

And although none of these evil consequences appear to have followed the violation of the law in this case, the construction and application of it as a preventive thereof cannot be varied or modified on that account.

My conclusion then is that the defendant is guilty of a violation of the law in bringing into this district 105 passengers in excess of what he was allowed to carry in the spaces appropriated to them, for which the law will impose upon him a fine of \$50 apiece, or \$5,250 in the aggregate.

NOTE. A mate acting as master is liable to the fine imposed on the master, although the agreement with the passengers was made with the former master, if he had knowledge of the facts, and had an opportunity to annul the contract before leaving the foreign port. *U. S. v. Morton*, 1 Low. 179. Where the passengers go on board openly, they are presumed to have been taken on board by the master within the purview of this section, (*U. S. v. Thomson*, 12 FED. REP. 265;) and where the libel states the offence in the words of the statute, it is sufficient. *U. S. v. The Neurea*, 19 How. 94.—[ED.

ERBER & STICKLER v. R. G. DUN & Co.

(Circuit Court, E. D. Arkansas. April Term, 1882.)

1. LIBEL—PRIVILEGED COMMUNICATIONS.

A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it, and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

2. MERCANTILE AGENCY—VERBAL STATEMENTS.

The verbal statements of a mercantile agency, made in relation to the plaintiffs' business credit and standing as merchants, to their subscribers, who had an interest in knowing the facts, and in answer to inquiries made by them, if made in good faith and upon information on which defendant relied, are privileged, and cannot be made the foundation of an action.

3. COMMUNICATIONS—WHEN CEASE TO BE PRIVILEGED.

A communication which would otherwise be privileged, if made with malice in fact, or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on plaintiffs to show malice in fact.

4. LIBEL—ON MERCHANTS OR BUSINESS MEN.

Every publication, in writing or in print, which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or business man, is a libel.

5. SAME—"DAILY NOTIFICATION SHEETS"—RESPONSIBILITY.

Where defendants, in the course of their business, issued "daily notification sheets," and sent them to all their subscribers, irrespective of their interest in the question of the plaintiffs' credit and standing, and this sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm, this fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs, defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers.

6. SAME—PROVINCE OF JURY.

Where such "daily notification sheet" contained the names of the plaintiffs, and opposite thereto the words "Call at office," it rests with the jury, in view of the definition of a libel, and considering all the evidence adduced and relating to these words, to determine whether they constitute a libel on the plaintiffs in their business as merchants.

7. SAME—MEASURE OF DAMAGES—PROVINCE OF JURY.

Where a publication is libellous, the law presumes that it was made with malice—technical, legal malice, but not malice in fact—and the amount of damages depends in a large degree upon the motives which actuated defendants in its publication, and in such cases the law leaves it to the jury to find and return such damages as they think right and just, by a sound, temperate, deliberate, and reasonable exercise of their functions as jurymen.

CALDWELL, D. J., (*charging jury.*) In the year 1880, and for some years prior thereto, the plaintiffs were partners engaged in the mercantile business at Texarkana, in the state of Texas. The defendants are partners engaged in conducting a mercantile agency, having their offices or agencies in many of the principal commercial cities of the United States and Canada. It is the business of defendants to collect, through the reports of local agents and from other sources, information as to the character, credit, and pecuniary responsibility of merchants, traders, and others engaged in commercial pursuits throughout the country, and to impart the information thus acquired to their subscribers verbally, on application therefor, and by means of a "daily notification sheet" printed and sent to their subscribers at the agency issuing such sheet. There are probably other modes of conveying to their subscribers such information, but they are not material to be considered in this case. The relations existing between the defendants and their subscribers is disclosed by the contract entered into between them, a copy of which is in evidence, and by the testimony in the case. The following is a copy of the agreement signed by the subscribers to the mercantile agency:

"TERMS OF SUBSCRIPTION TO THE MERCANTILE AGENCY.

"Memorandum of the agreement between R. G. Dun & Co., proprietors of the Mercantile Agency, on the one part, and the undersigned, subscribers to said agency, on the other part, viz.:

"The said proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been and shall mainly be obtained and communicated by servants, clerks, attorneys, and employes, appointed as our subagents in our behalf, by the said R. G. Dun & Co.; the said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to-wit:

"(1) All verbal, written, or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the reference book hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never under any circumstances be communicated to the persons reported, but shall be exclusively confined to the business of our establishment.

"(2) The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employes in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guarantied by the said R. G. Dun & Co. The action of said agency being of necessity almost entirely confidential in all of its departments and details, the said R. G. Dun & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney, or employe, or any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained.

"(3) The said R. G. Dun & Co. are hereby requested to place in our keeping, for our exclusive use, a printed copy of a reference book, containing ratings or markings of estimated capital and relative credit standing of such business men in such states as may be agreed upon, prepared by them or the servants, clerks, attorneys, and employes aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the reference book the one now placed in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title to said reference book is vested and remains in said R. G. Dun & Co.

"(4) We will pay in advance ——— dollars for one year's services from the date hereof of said R. G. Dun & Co., together with the use of said reference book pursuant to the foregoing conditions, and such other sum annually thereafter for the same as may be agreed upon between us, verbally or otherwise, subject always to the conditions and obligations above mentioned.

"(5) R. G. Dun & Co. are hereby permitted to reserve to themselves the right to terminate this subscription at any time on the repayment of the amount for the unexpired portion thereof.

"(6) If the inquiries for detailed reports during the year shall exceed — in number, the excess we agree to pay for at the rate of — per hundred."

The following is a copy of the ticket of inquiry signed by the subscribers to the agency when they want information in relation to those with whom they have or expect to have business relations:

"THE MERCANTILE AGENCY.

"*R. G. Dun & Co.*: Give us in confidence, and *for our exclusive use and benefit in our business, viz.*, that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility, etc., of —

Name.....	Business.....
Town.....	County.....
State.....	Subscriber.
St. Louis,.....188	No....."

And it was in answer to inquiries thus made by subscribers who had business relations with, or were creditors of, the plaintiffs that the verbal statements of the defendants in relation to the plaintiffs were made.

The plaintiffs do not contest the proposition that the business of the mercantile agency established and conducted by the defendants is, in its general features and purposes as disclosed by the evidence, both lawful and useful. It is unquestionably a lawful business, and it is now generally regarded as of utility and advantage to those engaged in conducting the business and commerce of the country.

In the fall of 1880 reports injurious to the credit and standing of the plaintiffs were in circulation in Texarkana. One of the plaintiffs tells you that these reports originated with one Kozminsky, another merchant and citizen of Texarkana. In time some statement of these reports reached the mercantile agency of the defendants at St. Louis. In what terms these reports reached the defendants' agency at St. Louis is not very clear. The plaintiffs contend the reports made by Porter, or some one else, at Texarkana, and given out by the defendants to their subscribers calling for the same, was to this effect, viz.: "Erber & Stickler are selling their goods below cost." "They are about to fail." "They have a bad business record." "Their creditors had better be on the guard and look after their claims."

Plaintiffs do not claim to have proven that defendants uttered or published all these statements to their subscribers. After critical examination of the depositions of the witnesses, in the light of the rules of evidence and the law applicable to the question, I feel justified in saying that the only sentence or clause of the alleged slanderous utterances set out in the complaint which is established by sufficient and legal evidence, or, indeed, by any evidence, is this: "Erber & Stickler are selling their goods below cost." But, in the view taken of the case by the court, it is not material to inquire whether the defendants uttered all the words alleged, or only part of them, or more. It is indisputable, under the evidence, that whatever was said orally by the defendants about the plaintiffs and their business was said in good faith and in confidence to their subscribers, who were by reason of their business relations with the plaintiffs interested in knowing their financial and business standing, and in answer to requests made by their subscribers in relation thereto, and without any malice in fact. This being so—and there is not the slightest evidence to admit of a conclusion to the contrary—the statements thus made by the defendants to their subscribers in answer to inquiries in relation to the plaintiffs are what the law terms "privileged communications." A communication is privileged when made in good faith in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party to whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper that he should give the information.

Accordingly, the verbal statements which the defendants made in relation to the plaintiffs' business credit and standing as merchants, to their subscribers who had an interest in knowing the facts, and in answer to inquiries made by them, having been made in good faith and upon information on which defendants relied, are privileged, and cannot be made the foundation of an action. But a communication which would otherwise be privileged is not so if made with *malice in fact*—that is, through hatred, ill-will, and a malicious desire to injure; and a statement privileged in the first instance may lose its privileged character by being repeated and persisted in after knowledge of the fact that it is false or erroneous has been brought home to its author.

It is not contended that the defendants were actuated by actual malice in first making the statements in relation to the plaintiffs. But the learned counsel for the plaintiffs insist that there is some

evidence, enough to make it the duty of the court to submit the question to the jury, that the defendants repeated and gave out the statements in relation to the plaintiffs after they had been informed of their false and erroneous character.

The burden of proof to show malice in fact is on the plaintiffs, and it should be reasonably clear and satisfactory. Malice in fact is never presumed: it is a fact to be proven; and if there is either no proof, or the proof is insufficient to warrant a verdict, it is the duty of the court to take the question from the jury. There is no evidence of malice in fact, and inasmuch as a verdict for the plaintiffs, based on the idea that the defendants were guilty of actual malice, would have to be set aside for want of evidence to support it, the jury are instructed to find for the defendants on all the paragraphs of the complaint based on oral statements of defendants to their subscribers made under the circumstances indicated. This disposes of the causes of action set out in all the paragraphs of the plaintiffs' complaint except the sixth. The issue on this paragraph is the only one left for you to consider. That paragraph is based on the publication by the defendants on the thirteenth day of December, 1880, of what is known as the "daily notification sheet," on which appeared the name of the plaintiffs' firm and residence with the words, "Call at office," opposite thereto. These "daily notification sheets" were sent out by the defendants to all their subscribers in the city of St. Louis, numbering 600, irrespective of their interest in the question of the plaintiffs' credit and standing. *This sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm.* This fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs the defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers.

"At the present day the law in relation to libel is that the judge is not bound to state to the jury as a matter of law whether the publication complained of and sued for is a libel or not; but the proper course is for him to define what is a libel in point of law, and leave it to the jury whether the publication falls within that definition, and, as incidental to that, whether it is calculated to injure the reputation of the plaintiffs." 2 Greenl. Ev. § 411; *McDonald v. Woodruff*, 2 Dill. 244. Accordingly, it becomes the duty of the court to define in law what is a libel. *Every publication in writing or in print which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or*

trade, or be injurious to his standing and credit as a merchant or business man, is a libel.

It is your duty to determine whether the publication of the "daily notification sheet," containing the names of the plaintiffs, and opposite thereto the words "Call at office," is a libel on the plaintiffs within this definition. Obviously these words taken by themselves, disconnected from everything else, do not import a libellous charge. But the plaintiffs claim that these words, in the connection in which they are used in this "daily notification sheet," have a fixed and settled meaning, well understood by the defendants and their subscribers, to whom the sheet was distributed, and that in substance and effect the meaning is that the defendants have information in relation to the parties named and their business damaging in its character, or well calculated to affect injuriously their credit, which information will be imparted to subscribers interested on request. The defendants deny that these words as used by them import any such meaning, or that they intend them to have any such meaning, or that they are susceptible of any such construction. Mr. Seranton, the manager of the defendants' agency at St. Louis, says that the words "Call at office," on the daily change sheet, "mean that we have in our possession information that may be beneficial to the subscribers with whom such trader deals," and that information may be beneficial to subscribers, or of interest to them, that is in no manner discrediting to the parties named, or calculated to affect injuriously their credit.

Keeping in view the definition of a libel which I have given you, and considering all the evidence relating to these words, as used by the defendants in their publication, it rests with you to say whether they constitute a libel on the plaintiffs in their business as merchants. If you believe from the evidence that the publication of plaintiff's firm name in the manner stated was intended by the defendants to convey to their subscribers the statement, in substance or effect, that the defendants were in possession of information damaging to the credit and commercial standing of plaintiffs as merchants, and that such was the meaning attached, and intended to be attached, to these words by their subscribers, to whom the publication was sent, then the publication was equally significant and injurious, and equally libellous, as if made in the distinct terms of such understanding on the face of the paper, and the plaintiffs are entitled to a verdict. It is not sufficient that one or more of the defendants' subscribers attached such injurious meaning to these words. It must appear either

that such is the fair meaning or effect of the words in the connection in which they are used, or that such is the meaning attached to them by the defendants, and is the sense in which they intend their subscribers shall understand them, and that their subscribers, or some of them, or other persons, do attach such meaning to them.

If you find the publication referred to is libellous under the foregoing instructions, you will then have occasion to consider the question of damages. If the publication was libellous, then the law presumes it was made with malice, but the malice which the law affixes to a libellous publication is a technical, legal malice, and not malice in fact.

Malice in fact must be proven as any other fact. The law does not presume it, and the jury cannot infer it without evidence to warrant such inference.

The amount of damages depends in a large degree upon the motives which actuated the defendants in making the publication, and the circumstances under which it was made, all of which you will take into consideration, if your finding makes it necessary to consider the question of damages.

"The law leaves the amount of the damages in such cases to the sound judgment of the jury, reasonably, fairly, and dispassionately exercised. This it does from necessity. If one man owes another so many dollars, or has taken from him so much property, or has broken a specific contract, there is something to *measure* (as the law terms it) *the amount of the damages or the recovery*. But in an action of this kind the law is unable to furnish you with any definite rule to measure the damages. It confides it to the sound, temperate, deliberate, and reasonable exercise of your functions as jurymen. The law leaves the jury at liberty to find and return such damages as they think right and just; but this is not a wild, unrestrained, communal liberty, to be arbitrarily exercised, but the higher and better kind of liberty, viz., liberty restrained by reason and moderated by justice." *McDonald v. Woodruff*, 2 Dill. 248.

Opinion of the court delivered after argument upon prayers for instructions:

CALDWELL, D. J., (*orally*.) The first instruction asked for by the plaintiffs is as follows:

"The jury are instructed that the business of the mercantile agency established and conducted by the defendants, R. G. Dun & Co., is, in its general features and purposes, as disclosed by the evidence, both lawful and useful, and information, however defamatory, communicated by such agency in good faith, and believing it to be true, through the defendants, R. G. Dun & Co., personally, to merchants personally, and applying therefor to guide them in their business, is in law a privileged communication, for which no action can be maintained by the parties defamed except on proof of express malice; and if the defendants, R. G. Dun & Co., had only communicated by themselves personally, to such of their subscribers as personally made inquiries concerning the standing and credit of the plaintiffs, the reports complained of, the case would have come within the rule of law as to privileged communications. * * * No person other than the merchant *himself*, asking for information, has in law a right to read, hear, or receive said words, and to him they can be lawfully communicated only by the defendants, R. G. Dun & Co. *personally*; and the reading of said words by any person in their employ by their permission, or the delivery of a written or printed statement containing said words by their employes, with their permission, to the clerks of a merchant subscriber requesting information concerning the plaintiffs, or to such subscribers, was an unlawful publication, not at all within or protected by the rule of law as to privileged communications."

The instruction as asked concedes too much to the defendants, or not enough. If such communications are privileged when made to one or all the members of a mercantile firm, it is not perceived why they are not equally so when made to an agent of such firm authorized to receive them for the firm, or for his own guidance in the conduct of the business of the firm confided to his charge. If such communications made to an agent under such circumstances are not privileged, no more are they when made to a principal. Courts should not close their eyes to the necessary and uniform method of conducting business among merchants and other business men and corporations, and no rule should be adopted that will render impracticable resort to these necessary and convenient methods in any particular instance, or branch of their business, unless some principle imperatively demands it, or it can be shown some good results will flow from it; results actually different and better than obtain under existing methods.

The merchants and other business men of the country conduct their business to a very large extent through agents. A large proportion, if not all, of the principal commercial houses of the country employ commercial travelers, through whom sales are effected, credit extended, and collections made. In many of the houses there is what is usually termed the "credit man" of the house, whose special busi-

ness it is to inquire in reference to the merit of all persons applying to purchase on credit, and who determines to whom credit shall be given, and the amount. The credit man of a house may or may not be a principal. It frequently occurs that he is a mere clerk or agent. Can it be sound law that a communication made to a principal in a house, to be by him immediately communicated to an agent of the house who conducts and controls the business to which such communication relates, is privileged, and that the same communication made directly to such agent is not privileged?

It is also said that while such information is privileged if imparted by some member of the firm of Dun & Co., it is not so if imparted by a clerk or agent of theirs.

If the business of the defendants is lawful, then it may be conducted by the same agencies that are lawful in the conduct of any other business.

The distinction attempted to be drawn between the right to resort to the services of an agent in this business, and other legitimate business pursuits, is not well founded. It is not in harmony with the known and universal methods of conducting business. Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents; and any rule of law that would deny to them the right to avail themselves of the services of an agent in every department of their business, and for every legitimate purpose connected with it, is unsound. What a man may lawfully do by himself he may do by an agent. The distinction taken between a communication to the principal and his agent in the case of *Beardsley v. Tappan*, 5 Blatchf. 497, is too refined. It is not supported by reason or authority.

Whether the information is given to the agent or his principal, it is in the end communicated to the person, be he agent or principal, for whose guidance it is intended.

The real question is whether such communications made by a commercial agency like that conducted by the defendants are privileged in any case. The communications in this case were made orally, and in confidence and in good faith, by the defendants or their clerks, in answer to inquiries from subscribers who were creditors of plaintiffs, and therefore had an interest in knowing their standing and pecuniary condition as merchants. The relation existing between defendants and their subscribers is disclosed by a written contract signed by the subscribers. [For copy of this contract see charge of the court to the jury.] It is insisted the effect of this argument is to make the

defendants the agents of their subscribers, and that the privilege that attaches to communications between principal and agent obtain for their protection.

It is questionable whether it is not pushing the doctrine of privileged communications beyond its legitimate scope to hold that a corporation or partnership whose business it is to collect information in regard to the standing and financial condition of business men, which is imparted to subscribers for a money consideration, can invoke the doctrine of privileged communication for its protection. That verbal information given in good faith and confidentially by the principal in such an agency, to merchants who have an interest in knowing the condition of the person inquired about, is privileged, was decided in *Beardsley v. Tappan, supra*.

While the distinction taken in that case between such communications made to a principal and to his agent is not regarded as sound, it is authority to the point that between principal and principal such communications are privileged. The only case on this point decided by a court of last resort, brought to our attention, is *Ormsby v. Douglass*, 37 N. Y. 477. That case is on all-fours with the case at bar, and, in the absence of opposing authority on the question, we incline to assent to its reasoning and to follow it. In the opinion of the court in that case, delivered by Mr. Justice Woodruff, it is said:

"It is a general rule that confidential communications respecting the character of another, made to one who is interested in the communication and desires information as a guide to himself in the conduct of his own affairs and dealings with each other, are privileged and not actionable. *Starkie*, Slander, 321; *Bradley v. Heath*, 12 Pick. 163, and cases cited; 3 B. & P. 587; 9 B. & C. 403."

Again:

"Upon the same general principle merchants have an interest in knowing, and have a right to know, the character of their dealers and those who propose to deal with them, and of those upon whose standing and responsibility they, in the course of their business, have occasion to rely.

"As a necessary consequence, they may make inquiries of other merchants, or of any person who may have information; and if such merchant or other person, in good faith, communicates the information which he has, or thinks he has, the communication is privileged."

Again:

"Information of the description referred to being important, there is no legal objection to the employment of an agent to seek and communicate it; and the agent may properly be paid for his time, labor, and expense in the pursuit of such information.

"If one merchant may employ his own private agent to seek and communicate such information, (3 Denio, 110,) there is no legal objection to the combination or union of two or more in the employment of the same agent. And, as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation, and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation a compensation therefor.

"In short, the inquiry is not, how did the defendant acquire the information, nor whether he received compensation for the information he had gained, but was the occasion one which justified him in giving such information as he possessed to the applicant."

It is worthy of remark that the author of this opinion was afterwards United States circuit judge for the second circuit, and Justice Hunt, of the supreme court of the United States, was also a member of the court of appeals at the time the case was decided, and seems to have concurred in the opinion.

The case of *Sunderlin v. Bradstreet*, 46 N. Y. 188, does not overrule or conflict with *Ormsby v. Douglass*. The question in the two cases was not the same.

The sixth paragraph of the complaint in this case raises the precise question decided in *Sunderlin v. Bradstreet*. That paragraph is as follows:

"That said R. G. Dun & Co. publish and issue daily, in their business, unto upwards of 10,000 persons or business firms in the United States and dominion of Canada a certain publication termed a 'daily notification sheet,' in which they purport to give the names of all persons or business firms in the United States of and concerning whom they have information of insolvency, bankruptcy, or approaching or impending insolvency or bankruptcy, or of such damaging character as to honesty, integrity, and financial worth as to give it to be understood that they are no longer worthy of credit, and against whom creditors of such persons or business firms had better take immediate proceedings to secure or collect their claims; that whenever said R. G. Dun & Co. desire to give said defamatory matter to be understood by merchants they publish and print the name of such person or business firm of and concerning whom such defamatory matter is intended to be conveyed in said 'daily notification sheet,' with the words 'Call at office' opposite the same.

"And plaintiffs allege and say that with the intent to give it to be understood of and concerning the plaintiffs that they were dishonest, were about to become insolvent and bankrupt, and defraud their creditors, and that their creditors had better proceed against them to secure or collect their respective claims and demands, and that plaintiffs no longer were entitled to or worthy of any credit, they, the said R. G. Dun & Co., did, on or about the thirteenth day of December last past, and on divers other days since, publish and print the plaintiff's firm name on the said 'daily notification sheet,' with the words

opposite thereto of 'Call at office,' which meaning, as aforesaid, was well understood by all to whom said sheet was delivered, being about 10,000 merchants or business firms in the United States."

This daily notification sheet was sent to all the subscribers to the agency in St. Louis, without regard to the question whether they had any interest in the defendants or their business. As a matter of fact not 1 per cent. of the subscribers to whom it was sent had such interest. It is too clear for argument that if this sheet contains a libel on the plaintiffs the defendants cannot avail themselves of the plea that it was a privileged communication. Whether there is anything in it that constitutes a libel on the plaintiffs will be left for the jury to determine under appropriate instructions.

Judge Cooley, in his treatise on the Law of Torts, p. 217, says: "But if one makes it his business to furnish to others information concerning the character, habits, standing, and responsibility of tradesmen, his business is not privileged and he must justify his reports by the truth." The cases cited do not support the broad language of the text. If the information referred to is given out publicly, or in written or printed sheets sent to subscribers generally, without regard to their interest in the parties named therein, it is not privileged, (*Sunderlin v. Bradstreet, supra*;) but if it is given confidentially and in good faith, on request of subscribers having an interest in the person and his business to whom the inquiry relates, it is privileged, (*Beardsley v. Tappan*, 5 Blatch. 497; *Ormsby v. Douglass*, 37 N. Y. 477.) The learned author doubtless had reference to information conveyed in the mode first stated, or in some general and public manner, and not to oral and confidential communications made in answer to inquiries from subscribers directly interested.

Ex parte THORNTON.

(Circuit Court, E. D. Virginia. June 22, 1882.)

1. LICENSES AND TAXES—RIGHT TO SELL GOODS UNDER.

The payment of taxes due in the home state of a merchant does not of itself entitle him to sell his goods in all other states free of taxation, nor is such exemption secured by the equal-privileges clause of the national constitution.

2. SAME—STATE LAWS—WHEN NULL AND VOID.

If the provisions of a state license and tax act are designed by the legislature to discriminate against non-resident merchants, and against goods sold from other states, in favor of resident merchants and goods held in the state for

sale, and if such discrimination be the practical effect of the law, and these two facts are legally established and brought home to the conviction of the court, the law must be declared null and void.

3. SAME—COMMERCIAL TRAVELERS—DISCRIMINATION AGAINST NON-RESIDENTS.

If the legislature of a state frames a law relating to merchants and sample merchants with the intention to discriminate against non-residents in favor of residents, and against goods in other states sold by sample in favor of goods held within the state for sale, and if the legislation has this practical effect, then such provisions are null and void, and all arrests and prosecutions under them are illegal.

4. SAME—EXTENT OF AUTHORITY OF LEGISLATURE.

The legislature has a right to discriminate against sample merchants in favor of merchants, the state being sovereign mistress of her own policy in determining what classes she shall lay a license tax upon, and what classes she shall exempt from such taxation, and in deciding how lightly or how heavily she shall make such a tax.

5. SAME—RESIDENT MERCHANTS—NON-RESIDENT AGENTS.

The assumption that a merchant is necessarily a resident, and that a sample merchant is necessarily a non-resident, is an arbitrary one, and one which a court of justice has no right, by mere inference, to accept as true.

6. SAME—EQUALITY OF LICENSES AND TAXATION.

Where an act of the legislature taxes each additional sample agent \$50 for all goods sold to the amount of \$50,000, and taxes the merchant for each additional \$50,000 of goods sold by him or his agents, the same amount of \$50, the law practically equalizes the tax upon the two classes, and no discrimination results.

7. SAME—STATE LAWS—CONSTITUTIONALITY OF.

It is only when a law discriminates against a foreign resident of a certain class, or against the goods held in another state for sale, in favor of a resident of the same class, and goods held within the state for sale, that it is obnoxious to the provisions of the national constitution in relation to the privileges and immunities of citizens of the several states, or the regulation of commerce with foreign nations and among the several states, or the prohibition of laying imposts or duties on exports or imports.

Petition for the Writ of *Habeas Corpus*.

W. H. Burroughs and *Charles Poe*, for petitioner.

Frank S. Blair, Atty. Gen., for the Commonwealth.

HUGHES, D. J. On the sixth of June, 1882, the petitioner, Hay T. Thornton, was committed to jail by a justice of the peace of Norfolk city on a charge of having sold and offered to sell in the said city, goods, wares, and merchandise by sample, card, description, or other representation, without having obtained a sample-merchant's license in accordance with sections 31 and 32 of the act of the general assembly of Virginia, approved April 22, 1882, entitled "An act for the assessment of taxes on persons, property, income, and licenses, and imposing taxes thereon for the support of the government and free schools, and to pay the interest on the public debt."

On the same day he filed his petition before this court, praying the award of the writ of *habeas corpus*, and objecting to his arrest on the ground that the provisions of the law under which he was held in custody were in violation of the constitution of the United States, and therefore null and void. The writ was issued as of course, and the sergeant of the city brought the petitioner before this court at once, and made return according to the facts. Thereupon the petitioner was admitted to bail on his recognizance to appear on a future day named to answer the judgment of the court in this matter. The case was adjourned to Richmond for hearing on the fifteenth of June, and directions were given that notice of the hearing should be filed with the attorney general of Virginia. On that day the case was heard on the papers in the cause, and on argument by the attorney general of Virginia for the state, and by counsel for the petitioner.

The petition sets out, among other things, the following facts: The petitioner is an employe of Samuel D. Egerton & Co., wholesale grocers in the city of Baltimore, Maryland. His duty is to travel and take orders for the sale of goods of the house named. His sales are made by sample, card, or description, and the goods, after sales are made, are shipped directly from the warehouse of Egerton & Co. in Baltimore to the purchaser. The petition concedes that the petitioner was selling by sample or card, etc., when he was arrested. It does not aver that the firm employing him had taken out a license as sample merchants in Virginia, or that he had power of attorney to act for them, as is required by law. The petition avers that the firm of Egerton & Co. had paid to the state of Maryland and to the city of Baltimore the taxes required to be paid there by law for conducting their business as wholesale grocers there.

The act of assembly under which the petitioner was arrested classifies tradesmen doing business in Virginia as follows: (1) Merchants; (2) commission merchants; (3) sample merchants; and so on.

The complaint of the petitioner is based upon sections 27 and 28 of the act of assembly in question, which relate to merchants; compared with sections 31 and 32, which relate to sample merchants. These sections provide that a sample merchant must pay \$250 for the privilege of selling by sample in the state, by means of one agent; and, if he employs more than one, then he must pay \$50 additional for each additional agent; and they provide that any merchant who pays a license tax of as much as \$250 may sell by sample agents, without limit to the number of agents. But, although the merchant may employ an unrestricted number of sample agents without

an increase of tax merely on account of the increase of their number, yet his tax is increased on another scale. If his purchases amount to \$50,000, he pays a tax of \$220; and if they are more than \$50,000, he pays at the rate of 10 cents per \$100, or \$1 for every \$1,000 of the increase; that is to say, he pays \$300 on \$100,000; \$400 on \$200,000; \$500 on \$300,000; \$600 on \$400,000; and so on. And no merchant can sell by means of sample agents unless he pays a tax of at least \$250. If there was intention on the part of the legislature to assimilate the tax on sample merchants with that on merchants, they seemed to assume that after each had been required to secure a license by paying each a tax of \$250, every sample agent after the first would sell goods to the amount of \$50,000, for license to do which he would pay \$50, while the merchant, if increasing his sales by agent or otherwise, is charged the same additional tax of \$50 for each increase in sales of \$50,000.

The charge of the petition before me is that those of the foregoing provisions of the Virginia law relating to merchants are meant for residents and designed to favor the business of residents, while those relating to sample merchants are meant for non-residents and designed to prejudice the business of non-residents, and that these provisions, taken together, are an injurious discrimination against non-residents in favor of residents, and are therefore repugnant to the following clauses of the constitution of the United States:

"The citizens of each state shall be entitled to all immunities and privileges of citizens in the several states." Art. 4, § 2. "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Art. 1, § 8. "No state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * * and all such laws shall be subject to the revision and control of the congress." Art. 1, § 10, sub. 2.

It is a fundamental principle that statutes are subordinate to constitutions, and that, where these conflict, the statute must, to the extent of the conflict, be held inoperative. The power of deciding whether or not such conflict exists, is, for the most part, reposed in the courts, state or federal; and although they exercise it with reluctance, they exercise it without hesitation. They are, however, naturally inclined, whenever called upon to scrutinize adversely the statute law, to confine their purview within the narrowest practicable limits, and to endeavor rather to preserve than to overthrow.

In the present instance I am at liberty to consider only those provisions of the Virginia license and tax act of April 22, 1882, which bear upon the case of the petitioner. If, among other provisions of that act, there be those liable to such objections as are urged against these, they are beyond my present cognizance, and, in point of fact, have not at all entered into the consideration of this case. I am to pass only upon a very few of the provisions of the voluminous act of which sections 27, 28, 31, and 32 are part, and I wish to exclude the conclusion that the whole act, or any considerable part of it, has been under review on this occasion. Nor am I at liberty to deal with the present case except upon the facts specifically averred in the petition before me. If there are facts connected with the petitioner's case or conduct, other than those formally alleged in the petition under oath, they are *dehors* the record and beyond my purview. The petition omits to allege that Egerton & Co. had paid the tax as sample merchants to the state of Virginia required by the license and tax act of 1882. It omits to allege that the petitioner, Thornton, at the time of selling by sample, had with him, as that act requires, any copy of a certificate from the clerk of some county or corporation of the state showing that his employers had obtained license to sell by sample in Virginia. It omits to allege that Thornton had with him his employers' power of attorney authorizing him to sell by sample for them, as the same act requires. On the subject of taxes the petition merely avers that Egerton & Co. had paid in Baltimore the taxes due from wholesale grocers to that city, and to the state of Maryland, under their local laws; and the complaint of the petitioner, therefore, would seem to be that he is aggrieved because he is not allowed in Virginia to sell goods by sample for a non-resident mercantile firm free from taxation here.

I do not suppose petitioner's counsel to pretend that the payment of taxes due at home by a merchant resident in one state itself entitles him to sell his goods in all other states free of taxation, or to pretend that such exemption is secured by the equal-privileges clause of the national constitution. Such payment only entitles the Maryland merchant to the enjoyment in Maryland of the privileges accorded by Maryland. When he enters any other state, it is not the privileges which Maryland grants her citizens that belong to him under the constitution of the United States, but only the privileges which the state he enters accords to her own citizens. Such a state may tax him just as she taxes her own citizens, but not otherwise; and she may tax him with sovereign disregard of the taxation which

Maryland may impose upon her citizens. This is elementary law. Even before 1860 it was never contended, even by the advocates of extreme doctrines on his subject, that the slaveholder of South Carolina who voluntarily entered Pennsylvania with his slave carried with him the slaveholding privilege allowed by his own state. If he claimed his slave, it could only be as a fugitive from service, and by virtue of a provision of the national constitution, distinct from the one under consideration, which allowed the privilege of reclaiming fugitives from service. The privilege given by South Carolina was never held to secure the constitutional privilege of slaveholding in other states. No more does the state license to sell goods in Maryland secure the constitutional privilege of selling in the other states, or of being credited there by the license tax paid in Maryland. I am very sure that the complaint of the petitioner in the case at bar is based upon other grounds than that by having obtained the privilege of selling goods in Maryland, he thereby became entitled to sell them free of taxation in the other states of the Union.

It is stated in the brief of petitioner's counsel that Egerton & Co. had in fact paid the sample merchant's tax of \$250 to Virginia when Thornton made the sale for which he was arrested. But I conceive that the allegation of this fact was purposely omitted from the petition, in order that this case may be decided upon other grounds than would have been presented if Thornton had been charged merely with the non-possession and non-exhibition of the clerk's certificate and power of attorney which the law required him to have with him when he sold as agent by sample. While such payment, if made, relieves the petitioner from the imputation of having acted in contumacy towards the state and contempt of her laws, and suggests that the purpose of his act of selling was not criminal, but was only to procure a judicial decision upon the validity of the provisions of law under which he has been arrested; still, I am not at liberty to consider the case with reference to such an incident as this, which in technical contemplation forms no part of it, and am bound to deal with it exclusively upon the basis of the facts set out under oath and disclosed by the record.

The broad ground on which it is evidently intended to rest this application for the discharge of the petitioner from arrest is that the clauses of the Virginia license and tax act of 1882 which have been mentioned above are null and void, and that the arrest of this petitioner under those clauses was therefore illegal. It must be conceded that, if the provisions of the Virginia license and tax act

which have been set out were designed by the legislature to discriminate against non-resident merchants and against goods sold from other states in favor of resident merchants and goods held in Virginia for sale, and if such discrimination be the practical effect of the law, and if these two facts are legally established and brought home to the conviction of the court, then the law in these respects is null and void, and must be so declared to be.

In order to the intelligent discussion of the case at bar, it is well to examine the decisions of the United States supreme court in cases construing the clauses of the constitution invoked by the petitioner. It will be seen that none of these cases are precisely like that of this petitioner; but they all illustrate the principles which govern it.

In *Brown v. Maryland*, 12 Wheat. 419, the United States supreme court considered a law of Maryland which required all importers of foreign merchandise who sold the same by wholesale, in the original bale or package, to take out a license. The law was resisted as unconstitutional. The court held it to be unconstitutional on three grounds: (1) That it imposed a duty on imports; (2) that it was a regulation of commerce; and (3) that the importer who had paid the duties required by the United States had acquired a right to sell them in the same original packages in which they were imported. The court did not deny, but expressly held, that when these goods were broken up from their original packages, and became mingled with the general merchandise of the country, they were liable to local taxation just as other merchandise.

This case related to goods imported from a foreign country. The following case related to goods of one state brought into another. It was the case of *Woodruff v. Parham*, 8 Wall. 123, in which the law reviewed was one which the city of Mobile, in Alabama, had passed, in pursuance of a provision of her charter, authorizing the taxation for municipal purposes of real and personal estate, *sales at auction*, sales of merchandise, etc. Under this provision an auction house of the city was taxed for sales of the products of states other than Alabama, made in the original unbroken packages. The tax was objected to as an interference with the freedom of commerce between the states, and the case was carried to the United States supreme court. That court decided that goods brought from one state into another were not imports in the sense of the constitution, and then said: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of

that or some other state. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an *attempt to fetter commerce* among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama." The court upheld the tax.

In *Cook v. Pennsylvania*, 97 U. S. 566, it was held, as it had been held in *Brown v. Maryland*, that the state tax on foreign goods in the original package is in conflict with sections 8 and 10 of article 1 of the United States constitution. The court virtually decided that if the goods, the tax on sales of which, in *Woodruff v. Parham*, had been of foreign importation rather than goods brought from another state, the tax would have been unconstitutional. In the same case the supreme court held, further, that a tax laid by a state on the amount of sales of goods by an auctioneer is a tax upon the goods sold.

In the case of *Webber v. Virginia*, 103 U. S. 350, the court held that a tax upon manufacturers' agents is a tax upon the goods manufactured; and if *this is made to depend upon the foreign character of the articles*,—that is, upon their having been manufactured without the state,—it is to that extent a regulation of commerce. "No one," it says, "questions the general power of the state to require licenses for the various pursuits and occupations conducted within her limits.

* * * But where a power is vested exclusively in the federal government, and its exercise is essential to the perfect freedom of commercial intercourse between the several states, any interfering action by them must give way." The law reviewed in this case was the license and tax act of Virginia of 1876, which provided virtually, as stated by the court, that "the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while the agent for the sale of articles manufactured in the state is not required to obtain a license or to pay any tax." The court said: "Here there is a clear discrimination in favor of home manufactures, and against the manufactures of other states," and pronounced the law void. In this case the discrimination against the manufactures of other states, which was the vice of the law, was apparent from the terms and tenor of the law, and did not require to be brought home to the conviction and comprehension of the court by proof *abunde*.

In the case of *Welton v. Missouri*, 91 U. S. 275, the state law reviewed was one imposing a license tax upon peddlers who dealt in

and sold goods, wares, and merchandise which were not the growth, produce, or manufacture of the state of Missouri, and imposed no such tax on peddlers who sold such things which were the growth of Missouri. This law was held to be in conflict with the power constitutionally vested in congress to regulate commerce between the states, and was pronounced void.

In the case of *Ward v. Maryland*, 12 Wall. 418, the state law which was reviewed by the court was one that imposed on resident traders a license tax of from \$12 to \$150, according to a scale prescribed, and made it a penal offence for non-residents to sell goods, wares, and merchandise in the state by card, sample, or other specimen, without first obtaining a license so to do, and paying a tax of \$300 for the license. The court said, speaking of the constitutional provisions on the subject of trade between the states, that they "would become comparatively valueless if it should be held that each state possesses the power, in levying taxes for the support of its own government, to discriminate against citizens of every other state of the Union. * * * The court is of opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described * * * who are not permanent residents in the state, and that the statute is repugnant to the federal constitution, and invalid for that reason."

Mr. Justice Bradley assented to the ruling of the court, but not only on the ground that the Maryland law discriminated in favor of residents against non-residents; but he said:

"I am further of opinion that the act is in violation of the commercial clause of the constitution which confers on congress the power to regulate commerce among the several states; and it would be so although it imposed upon residents the same burden for selling goods by sample as is imposed on non-residents. Such a law would effectually prevent the manufacturers of the manufacturing states from selling their goods in other states unless they established commercial houses therein, or sold to resident merchants who chose to send them orders."

That is to say, Justice Bradley holds that manufactures of other states, *as such*, cannot be taxed at all, unless taxed simply as manufactures, whether produced in or out of the state.

In the case of *Reading R. R. v. Pennsylvania*, 15 Wall. 232, it was held that a state statute imposing a tax upon freight taken up in the state and carried to another state, or taken up without the state and brought within it, by railroads or other modes of transportation, is repugnant to that provision of the United States constitution which

ordains that congress shall have power to regulate commerce with foreign nations and among the several states, etc.

In the *Passenger Cases*, 7 How. 283, the supreme court held that a state law which imposed a tax upon the master or owner of every vessel from a foreign port for each passenger brought by the vessel was a regulation of commerce by the state, and in conflict with the constitution and laws of the United States, and therefore void.

The same ruling was made in *Henderson v. Mayor*, 92 U. S. 259, in which case it was besides ruled, among other things, that in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by the natural and reasonable effect of its provisions.

In *Crandall v. Nevada*, 6 Wall. 35, a state law imposing upon railroads and stage-coaches a tax per head upon every passenger they carried out of the state was held invalid for sundry reasons, but especially because it was a tax upon commerce and repugnant to the provision of the constitution which empowers congress to regulate commerce between the states.

Other cases might be cited in illustration of the provisions of the national constitution now under interpretation, and showing the construction which at various times the supreme court has put upon state laws charged to have been in conflict with them. I am sure, however, that those which have been cited, although no one of them resembles closely the case at bar, sufficiently instruct us in the principles on which the present case depends.

In the light of these cases I can repeat with absolute confidence that if the legislature of this state framed the provisions of the act of April, 1882, which relate to merchants and sample merchants, in the intention to discriminate against non-residents in favor of residents, and against goods in other states sold by sample here in favor of goods held here for sale; and if they succeeded in this intention by legislation having that practical effect; and if these facts appear to the court from the terms and tenor of the law, or are brought to its comprehension and conviction in a legal and conclusive manner,—then such provisions are null and void, and all arrests and prosecutions under them illegal. It is also to be considered that all this is to appear affirmatively, for no principle is better settled than that announced by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 436, that the “presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies its constitutionality.”

Now the most careful scrutiny will fail to show anything in the text of the law of Virginia relating to merchants and sample merchants which reveals a discrimination in favor of residents against non-residents. If the law does discriminate between such classes it does so, not in language, not in express terms, but only by its practical effect. The law makes no use anywhere of the terms "resident" and "non-resident," except in one of the sections concerning sample merchants, to declare that its provisions shall apply indiscriminately to residents and non-residents. If this law, therefore, does make the discrimination complained of, the fact is to be discovered by considering its effect, and by inferences from its general aim and purpose, and is not derivable, as in *Ward v. Maryland*; *Welton v. Missouri*; *Webber v. Virginia*; *Woodruff v. Parham*, and the other cases which have been cited, from its terms and language.

In order to fix this vice upon the law, it is almost if not absolutely necessary to assume that the licensed merchant which it taxes must in every instance be a resident, and that the sample merchant must be a non-resident; for the objection urged in argument against the law is that it discriminates against sample merchants in favor of merchants. This discrimination the legislature had a right to make; just as much right as it has to require a license tax from a merchant for the privilege of carrying on his business, while requiring no such tax from the farmer. So the legislature has a right to discriminate between a merchant and a sample merchant by taxing the business of the one lightly, while taxing that of the other heavily; or taxing one heavily and taxing the other not at all. The state is sovereign mistress of her own policy in determining what classes she shall lay a license tax upon, and what classes she shall exempt from such taxation; and in deciding how lightly or heavily she shall make this sort of taxes. She cannot, it is true, in exercising this sovereign function, discriminate, either expressly or practically, against non-residents in favor of residents, or against property in other states sold here, in favor of property held in this state for sale.

And therefore it seems to me that it is essential to the petitioner's case for the fact to be that merchants licensed under this law must necessarily be residents and that sample merchants licensed under it must necessarily be non-residents. No proof has been adduced to show that these two propositions are true. My own reason teaches me that merchants of other states may establish branch houses in this state without becoming residents; and also that residents of the state may, from stocks of goods in warehouse, sell by sample

through the instrumentality of sample agents without engaging in business in the ordinary way of merchants. It seems to me that the assumption that a merchant is necessarily a resident, and that a sample merchant is necessarily a non-resident, is an arbitrary one, not sustained by proof, and one which a court of justice has no right, by mere inference, to accept as true.

But even if this were a fact there is no proof or evidence, or showing of any sort, that the taxation imposed by the state on sample merchants is greater than that imposed on merchants in respect to sales by sample. I do not pretend that it was incumbent upon the legislature to equalize the taxes upon these two classes; but even if it was, I have already said that the law seems to have proceeded upon the estimate that each additional sample agent after the first will probably sell goods to the amount of \$50,000. If this was the purpose and hypothesis of the legislature, then, by taxing the sample agent \$50, and taxing the merchant for each additional \$50,000 of goods sold by him or his agents the same amount of \$50, the law seems practically to have equalized the tax upon the two classes, and no discrimination results. If this were the endeavor and theory of the legislature, then the courts must accept and enforce its scheme of taxation, unless it be demonstrated by proof, or brought to its cognizance in some other legal way, that the scheme is vicious by reason of the practical inequality and discrimination resulting from it between residents and non-residents. No proof whatever has been furnished in this case of such effect of this law, and I am bound to consider that the legislature, representing the practical business of the state, acted judiciously in the discharge of this part of its appropriate duties. Is the opinion of one judge, in such a complex matter as this, involving facts rather than principles of law, the judge being uninformed by any proof or evidence whatever, and the matter relied upon not being apparent in the statute or in the record of the case before him, to prevail against the action of a deliberative body, well informed upon the matters dealt with, and immediately representing the practical business of the state?

The truth is that the case before me turns upon facts *in pais*, facts not found in the statute or the record, rather than upon any doubtful principles of law. The principles of law are well settled; it is only the facts which are in doubt. I do not believe the fact to be that there is any violent difference between the tax imposed upon the sample merchant and that imposed upon such merchants as are empowered to sell by sample. Even if a discrimination were made by

law between these two classes of merchants, it is one which the legislature had a right to make, unless, in doing so, it intended and practiced a discrimination between residents and non-residents; and I do not think it did, for I am not bound to believe, and, in fact, do not believe, that merchants are necessarily residents and sample merchants non-residents. I can derive no conclusion that they are from the law itself, or from any facts of which I can take judicial cognizance; and no proof whatever has been adduced, either in the form of affidavits or other evidence, that these two classes are respectively residents and non-residents.

Repeating that it is only those clauses of sections 27, 28, 31, and 32, of the act of April 22, 1882, which bear upon the case of the petitioner, that I have considered, and that my ruling embraces them alone, I am of opinion that they are not repugnant to any provision of the constitution of the United States, either in form or effect, and that this court has no right to discharge the petitioner from arrest. He must, therefore, be remanded to the custody of the sergeant of Norfolk.

The following is an abstract of the law brought in question in the foregoing decision :

"License and Tax Act of the General Assembly of Virginia. Approved April 22, 1882.

"MERCHANTS.

"Sec. 27. Every merchant shall pay a license tax for the privilege of transacting business in this state, to be graduated by the amount of purchases made by him during the period for which his license is granted. * * *

"Sec. 28. On every license to a merchant or mercantile firm the tax to be paid shall be graduated as follows: If the amount of purchases shall not exceed \$1,000, the tax shall be \$5; where purchases do not exceed \$2,000, the tax shall be \$10; and for all purchases over \$2,000, and less than \$50,000, there shall be a tax of 40 cents on the \$100; and upon all purchases over \$50,000 there shall be a tax of 10 cents on every \$100 in excess of \$50,000.
* * *

"SAMPLE MERCHANTS.

"Sec. 31. Any person who shall sell, or offer to sell, any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or any agent for the sale or collection of orders by sample or description list, * * * shall be deemed to be a sample merchant. It shall not be lawful for any person or persons to sell, or offer to sell, any description of goods, wares, or merchandise without first having obtained a license therefor from the commissioner of some county or corporation, which license shall grant the privilege to sell anywhere in the state, and shall be valid one year from the date of its issue; but if used out of the county or corporation where granted, the clerk of the court of such county or corporation shall certify thereon, with the seal of the court affixed, that the officer sign-

ing the said license is really the commissioner of the revenue for the district wherein the license issued, and that his signature is believed to be genuine: provided, that it shall not be lawful for the clerk of any county or corporation to furnish any certificate relating to the grant of a license other than in the manner authorized and directed by this section. Such license thus obtained shall be a personal privilege, and shall not be transferable, nor any abatement in the tax thereon allowed. No county, city, or town shall have the right to levy or collect a tax on sample merchants. Any person or persons who shall sell, or offer to sell, in violation of this act, shall pay a fine of \$300 for the first offence, and \$500 for each succeeding offence; the informer to receive one-half of the fine so collected. Nothing in this section shall be construed to allow sample merchants to sell to any person other than a manufacturer or licensed merchant, keeper of an ordinary or eating-house, without taking out the additional license required of merchants. * * *

"TAX ON SAMPLE MERCHANTS.

"Sec. 32. The specific license tax for the privilege of selling by sample, card, description, or other representation, shall be \$250, and any sample merchant who shall permit any person, except a duly-authorized agent or salesman, to sell under his license otherwise than for his exclusive use and benefit, shall pay a fine of \$50 for each offence. No agent or salesman shall be permitted to sell, or offer to sell, as aforesaid, except he have with him at the time the license granted to the person for whom he acts, and a duly-executed power of attorney from said person constituting him his agent or salesman for the time being. Additional salesmen may be allowed under the following restrictions: For each additional agent or salesman employed to sell as aforesaid there shall be an additional tax of \$50; and the said additional agent or salesman shall not be permitted to sell, or offer to sell, as aforesaid, except he have with him at the time a copy of the license granted to the person for whom he acts, duly certified to by the clerk of the court from which the license was issued, under the seal of said court, and certificate from the treasurer of the county, city, or town wherein the license was obtained, and that the additional tax required by this act has been paid, which said certificate and power of attorney shall be exhibited whenever required by any officer of the law or private citizen. * * * Nothing in this or the preceding section shall be construed to require any licensed merchant or manufacturer who has paid a license tax of not less than \$250 to pay an additional tax for selling, or offering to sell, by sample, either by himself or agents." * * *

NOTE.

STATE LICENSE TAX. Under the provisions of the constitution of the United States, article 1, creating the legislative power of the general government and restricting the legislative power of the several states, it has been judicially decided that a tax on sales is a tax on the proceeds, and not on the imports.(a) Requiring a license for non-resident traders to vend foreign merchandise is not a tax on imports or exports,(b) nor is a provision requiring

(a) *State v. Pinckney*, 10 Rich. 474. See *Cool-*
v. *Pennsylvania*, 97 U. S. 566.

(b) *Sears v. Commissioners*, 36 Ind. 267; In re
Rudolph, 2 Fed. Rep. 65.

hawkers and peddlers to take out a license.(c) A license for the sale of goods, if imposed on all persons engaged in the same business, is not inconsistent with this provision;(d) but a license tax discriminating against products of other states is in conflict;(e) so a state cannot impose a license tax on a traveling agent from other states.(f) A state cannot impose on products of another state brought in for sale or use a more onerous burden or tax than upon like products of its own territory;(g) but an annual tax on all peddlers of a certain class selling by sample is a tax on all, irrespective of the place of the production of the material or the manufacture, and is not a violation of the constitution.(h) A state may levy a tax on business and persons within its limits;(i) so it may tax professions, occupations, and trades;(j) and such license acts are not unconstitutional.(k) Congress may regulate licenses to carry on trade within a state for internal revenue purposes, yet the power of the state to tax, control, or regulate the business is not incompatible;(l) so although letters patent grant exclusive rights to make and vend, yet the state may regulate the use of that right as to merely internal commerce or police.(m) The United States licenses will not warrant carrying on a business in violation of a state law.(n) State prohibitory laws are operative against such licenses;(o) so a license under the internal revenue act is no bar to an indictment under a state law.(p) The state may regulate the sale of intoxicating liquors,(q) and require a license for the same,(r) or prohibit the sale altogether.(s) A tax law taxing the selling of intoxicating liquors is inoperative only so far as it discriminates against imported wines and beer.(t) Cities may exercise all powers constitutionally conferred on them.(u) A city ordinance regulating the sale of intoxicating liquors is not unconstitutional;(v) and giving a license by a municipal corporation is not

(c) *Com. v. Ober*, 12 Cush. 493.

(d) *Dist. of Columbia v. Humason*, 2 McArthur. 162.

(e) *Ward v. Maryland*, 12 Wall. 430; *Woodruff v. Parham*, 8 Wall. 123; *Welton v. State*, 91 U. S. 275; *State v. North*, 27 Mo. 464; but see *Davis v. Dashiell*, Phill. (N. C.) 114; *Guy v. Baltimore*, 100 U. S. 434; *Tiernan v. Rinker*, 102 U. S. 123.

(f) *Welton v. State*, 91 U. S. 275; *State v. Browning*, 62 Mo. 591.

(g) *Guy v. Baltimore*, 100 U. S. 434.

(h) *Machine Co. v. Gage*, 100 U. S. 676.

(i) *Nathan v. Louisiana*, 8 How. 73.

(j) *Nathan v. Louisiana*, 8 How. 73; *State v. North*, 27 Mo. 464; *Biddle v. Com.* 13 Serg. & R. 405.

(k) *License Cases*, 5 How. 504.

(l) *License Tax Cases*, 5 Wall. 462.

(m) *Patterson v. Kentucky*, 11 Chl. Leg. News, 183.

(n) *License Tax Cases*, 5 Wall. 462; *McGuire v. Com.* 3 Wall. 387; *Pervear v. Com.* 5 Wall. 475.

(o) *Thurlow v. Massachusetts*, 5 How. 504; *McGuire v. Com.* 3 Wall. 387; *License Tax Cases*, 5 Wall. 462; *Pervear v. Com.* 5 Wall. 480; *Bertholf v. O'Reilly*, 18 Am. L. Reg. (N. S.) 119;

Metrop. Bd. of Excise v. Barrie, 34 N. Y. 657; *People v. Coleman*, 4 Cal. 46.

(p) *Pervear v. Com.* 5 Wall. 460; *Com. v. Owens*, 114 Mass. 252.

(q) *Bartemeyer v. Iowa*, 18 Wall. 129; *Gloversville v. Howell*, 70 N. Y. 287; *O'Dea v. State*, 57 Ind. 31.

(r) *License Cases*, 5 How. 594; *State v. Wheeler*, 25 Conn. 290; *Perdus v. Ellis*, 18 Ga. 586; *Ingersoll v. Skinner*, 1 Denfo, 540; *Jones v. People*, 14 Ill. 196; *Santo v. State*, 2 Iowa, 165; *State v. Donehey*, 8 Iowa, 396; *Corwin v. Kimball*, 41 Mass. 359; *Corwin v. Clapp*, 71 Mass. 97; *Keller v. State*, 11 Md. 525; *State v. Moore*, 14 N. H. 451; *State v. Peckham*, 3 R. I. 289; *City v. Ahrens*, 4 Strob. 241.

(s) *Bertholf v. O'Reilly*, 18 Am. L. Reg. (N. S.) 119; *Metrop. Bd. of Excise v. Barrie*, 34 N. Y. 657; *Anderson v. Com.* 13 Bush, 485; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25.

(t) *Tiernan v. Rucker*, 102 U. S. 123.

(u) *Logansport v. Seybold*, 69 Ind. 225.

(v) *License Tax Cases*, 5 How. 624; *Downing v. Alexandria*, 10 Wall. 173; *Reall v. State*, 4 Blatchf. 107; *Lunt's Case*, 6 Me. 412.

a regulation of commerce,^(w) nor a violation of the constitution,^(x) even though the business extends beyond the limits of the state.^(y)

PRIVILEGES AND IMMUNITIES. These expressions, as used in article 4, § 2, of the constitution of the United States, are confined to those privileges and immunities which are in their nature fundamental,^(a) such as protection by the government; the enjoyment of life and liberty; the right to acquire and possess property, and to pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good;^(b) such privileges and immunities as belong to general citizenship,^(c) including the right to pass freely into and through any state for the purposes of commerce, trade, residence, etc.,^(d) the right to pursue a lawful employment in a lawful manner, and to be exempt from any higher taxes or excises than those imposed on its own citizens.^(e) Congress cannot grant privileges to citizens of one state over those of another, and cannot give a state the power to do so.^(f) Where the laws differ, a citizen of one state claiming rights in another must claim according to the laws of that state and not of his own.^(g) Citizens do not by this clause acquire any peculiar privileges in another state except upon the condition on which they may be held or enjoyed by the citizens of such other state.^(h) The main object of this clause was to prevent each state from discriminating in favor of its own people, or against those of any other state;⁽ⁱ⁾ but it is not intended to secure the citizens of any state against discriminations made by their own state in favor of citizens of other states, nor of one class against another class of citizens of the same state.^(j) A state law imposing a discriminating tax on non-resident traders is void,^(k) but the property of a non-resident may be taxed equally with that of a resident.^(l) A tax on those who sell goods brought into the state and not owned by residents is valid.^(m) A license on the sale of goods by non-resident traders is valid if there is no discrimination;⁽ⁿ⁾ so a license required to vend foreign merchandise is valid,^(o) or for all articles except those manufactured by themselves within the limits of the state.^(p)—[Ed.

(w) *Chilvers v. People*, 11 Mich. 43; *People v. Babcock*, 11 Wend. 536.

(x) *Home Ins. Co. v. Augusta City*, 93 U. S. 116.

(y) *Osborne v. Mobile*, 16 Wall. 482; and see *Home Ins. Co. v. Augusta City*, 93 U. S. 116.

(a) *Corfield v. Coryell*, 4 Wash. C. C. 380.

(b) *Ward v. Maryland*, 12 Wall. 430; *Slaughterhouse Cases*, 16 Wall. 76; *Corfield v. Coryell*, 4 Wash. C. C. 380; *Bennett v. Boggs*, Bald. 60; *Com. v. Milton*, 12 B. Mon. 212; *Campbell v. Morris*, 3 Har. & McH. 535; *Ward v. Morris*, 4 Har. & McH. 330; *State v. Medbury*, 3 R. I. 142; *Live Stock Co. v. Crescent City*, 1 Abb. (U. S.) 398.

(c) *Scott v. Sanford*, 19 How. 580.

(d) *Ward v. Maryland*, 12 Wall. 430; *Crandall v. Nevada*, 6 Wall. 49; *Lemmon v. People*, 20 N. Y. 607; *Ex parte Archy*, 9 Cal. 147; *Willard v. People*, 5 Ill. 461; *Julia v. McKinney*, 3 Mo. 270; *State v. Medbury*, 3 R. I. 142.

(e) *Ward v. Maryland*, 12 Wall. 430; *Wiley v. Parmer*, 14 Ala. 627; *Oliver v. Washington Mills*, 11 Allen, 268.

(f) *Chapman v. Miller*, 2 Speer, 769.

(g) *Lemmon v. People*, 20 N. Y. 562.

(h) *Paul v. Virginia*, 8 Wall. 168; *Reynolds v. Geary*, 26 Conn. 179; *Com. v. Milton*, 12 B. Mon. 212; *Lemmon v. People*, 20 N. Y. 562.

(i) *Davis v. Pierce*, 7 Minn. 13; *Paul v. Virginia*, 8 Wall. 168; *Ward v. Maryland*, 12 Wall. 418; *Williams v. Bruffy*, 96 U. S. 183; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Lemmon v. People*, 20 N. Y. 608.

(j) *Com. v. Griffin*, 3 B. Mon. 208; *Bradwell v. State*, 16 Wall. 138.

(k) *Ward v. Maryland*, 12 Wall. 418; *Wiley v. Parmer*, 14 Ala. 627; *Osborne v. Mobile*, 16 Wall. 482; *Mobile v. Kimball*, 102 U. S. 691; *Welton v. Missouri*, 55 Mo. 288; *State v. Browning*, 62 Mo. 591; *Webber v. Virginia*, 103 U. S. 344.

(l) *Duer v. Small*, 4 Blatchf. 263; *Battle v. Corporation*, 9 Ala. 234.

(m) *People v. Coleman*, 4 Cal. 46.

(n) *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Mount Pleasant v. Clutch*, 6 Iowa, 546; *In re Rudolph*, 2 Fed. Rep. 65.

(o) *Sears v. Commissioners*, 36 Ind. 267.

(p) *Seymour v. State*, 51 Ala. 52.

STOUT v. COMMERCIAL UNION ASSURANCE CO.*

(Circuit Court, D. Indiana. June 27, 1882)

INSURANCE AGAINST FIRE—CONTRACT—CONDITIONS CONSTRUED.

Conditions and warranties in policies, especially where numerous and in fine print, should be strictly construed against the insurer; and if, in reading the written part of the policy in connection with the condition or warranty, there be doubts as to whether it was intended to include a certain hazardous article in the risk, the assured are entitled to the benefit of the doubt.

Claypool & Ketcham and Martindale & Son, for plaintiff.

Harrison, Hines & Miller and McDonald & Butler, for defendant.

GRESHAM, D. J. The Commercial Union Assurance Company, of London, issued a fire policy to the plaintiffs for \$5,000, for one year, from the second day of July, 1880, for a premium of \$——. The property covered was described in the written part of the policy, which reads thus: "\$5,000 on their stock in trade as wholesale grocers, comprising all articles kept for sale in such stocks, in, etc., Nos. 107 and 109 South Meridian street, Indianapolis, Indiana; \$50,000 total insurance. Permission is hereby granted the assured to keep 50 pounds of gunpowder on the premises without prejudice to this policy." It is provided in the printed part of the policy that "if the assured shall keep or use gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish; or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void." Also, that "this company shall not be liable * * * for any loss caused by the explosion of gunpowder or any explosive substance." The building and its contents were destroyed by fire during the life of the policy, and this suit is brought to recover the amount of the risk. The insurer sets up in the third paragraph of its answer that at and before the fire the assured had in the building described in the policy 218 pounds of saltpeter, without the insurer's written consent in the policy. To this paragraph the assured replies that saltpeter is an article in a wholesale grocer's stock; that it is usually kept for sale as a part of such stock; that they had on hand at the time the insurance was taken, and at the time of the fire, for sale to their customers, and for no other purpose, from one to three hundred pounds of saltpeter—that being a reasonable

*Reported by Chas. L. Holstein, Esq., U. S. Dist. Att'y.

amount and no more than their trade demanded; and that the insurer knew the assured were carrying on the business of wholesale grocers at the time the risk was taken. The insurer demurs to this paragraph of the answer.

Does the written part of the policy, describing what was intended to be covered by the risk as "all articles kept for sale in such stocks," limit or modify the condition or warranty contained in the printed part, which prohibits the keeping of saltpeter? There would seem to be no difficulty in answering this question in the affirmative, if permission were not given in the written part of the policy to keep gunpowder, that being one of the prohibited articles. There is weight in the argument that, by expressly mentioning gunpowder, and excepting it from the condition, that it was to remain in force as to the other prohibited articles. On the other hand, the insurer knew at the time the risk was taken that it was insuring a stock of wholesale groceries, and in describing the property insured language was employed broad enough to include all articles kept for sale in such stocks. Besides this, the demurrer admits that saltpeter is usually kept for sale by wholesale grocers, and that it was in fact an article in the stock of the assured at the time the risk was taken. The keeping of saltpeter, under these circumstances, should not be allowed to avoid the policy. The assured are entitled to a liberal construction of the contract, the written part of which embraces all articles belonging to a wholesale grocer's stock. Saltpeter, as already stated, belongs to such stocks; therefore, it may be said written permission was given in the policy to keep saltpeter.

Insurance companies, it is known, are in the habit of preparing their contracts to suit themselves, and where doubts arise in their construction it is not unfair to resolve these doubts against the insurer. Conditions and warranties in policies, especially where numerous and in fine print, should be strictly construed against the insurer, and if in reading the written part of the policy in suit, in connection with the condition or warranty which is relied on by the insurer, there be doubts as to whether it was intended to include saltpeter in the risk, the assured are entitled to the benefit of these doubts. *Franklin Ins. Co. v. Brock*, 57 Pa. St. 134; *Grant v. Lexington Fire Ins. Co.* 5 Ind. 23; *Niagara Falls Ins. Co. v. De Graff*, 12 Mich. 124; *Elliott v. Hamilton Mut. Ins. Co.* 13 Gray, 139; *Viele v. Germania Ins. Co.* 26 Iowa, 9; *Hall v. Ins. Co. N. A.* 58 N. Y. 292; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Archer v. Merchants', etc., Ins. Co.* 43 Mo. 432.

The case of *Steinbach v. Ins. Co.* 13 Wall. 183, is relied on in support of the demurrer. That was a suit on a policy against fire, and the subject of insurance was described in writing in the body of the policy as follows: "On his stock of fancy goods, toys, and other articles in his line of business contained in the brick building situated, etc., and now in his occupancy as a German jobber and importer. Privileged to keep fire-crackers on sale." The premium paid was 40 cents on the \$100. Among the second class of hazards, classed as hazardous, No. 2, were enumerated fire-crackers in packages, and it was stated that they added to the rate of premium 10 cents on the \$100; and classed as especially hazardous were fire-works, which added 50 cents or more to the rate, and to be covered were to be especially written in the policy. The fire originated in fire-works which the assured had in his store for sale, without written permission in the policy, and this being admitted he offered to prove on the trial "that fire-works constituted an article in the line of business of a German jobber and importer." The evidence was rejected, and the assured took the case to the supreme court on a writ of error, where it was affirmed. The assured insisted in this case that the language "other articles in his line of business as a German jobber and importer" covered fire-works. It was not claimed that fire-works were covered by the policy because they were an article in a stock of fancy goods and toys in the business of a German jobber and importer, but because they were an article in the line of Steinbach's business. If the business of importing and jobbing fancy goods and toys from Germany was a well-understood trade in well-known articles, like the business of wholesale grocers, Steinbach's business might embrace all or less than all the articles belonging to such a business.

In the case at bar saltpeter is claimed to be covered by the policy; not because it was an article in the stock and business of the assured, but because the subject insured was a stock of wholesale groceries, comprising all articles kept for sale in such stocks, one of which was saltpeter. I think the cases are distinguishable. And, further, fire-works were classed in *Steinbach v. Ins. Co.* as specially hazardous, and added 50 cents or more on the \$100 to the premium. This fact seems to have had weight with the supreme court. "They [fire-works] are among the goods described as specially hazardous," say the court in the brief opinion written by Chief Justice Chase, "and add 50 cents on the \$100 to the ordinary rate of insurance. It

is impossible to think they are described by the general terms used in the policy. The insurance was at the ordinary rates."

It does not appear from the policy in suit that any increased rate was expected for keeping saltpeter; and written permission being given to keep gunpowder,—a much more explosive and dangerous substance than saltpeter,—it would be unreasonable, if not unjust, to hold the policy void because the latter was kept.

The demurrer is overruled.

FLETCHER v. NEW YORK LIFE INS. CO.*

(Circuit Court, E. D. Missouri. May 1, 1882.)

INSURANCE—APPLICATION—CONTRACTS—EVIDENCE.

Where a party desiring insurance signed a written application therefor, containing certain questions and answers concerning matters material to the risk, and which also contained the following agreement, viz.: "And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company, the fullness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue the policy which may be issued thereon shall be void, and all moneys which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company, in the city of New York, have the authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company, at the home office, named in the above application;" and a copy of the application was attached to the policy when issued: *held*, in a suit on the policy, to which the defendant set up as a defence the fact that the application contained two false answers material to the risk, that the assured was bound by such answers, and that oral evidence was inadmissible which tended to prove that such answers had been reduced to writing by the soliciting agent of the defendant, by whom the questions to which such answers were appended had been propounded to the assured, and who had undertaken to insert the assured's answers; and that the assured's answers to such questions had been true, and that he signed the application supposing it contained the answers given by him.

Motion for a New Trial.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

For report of case and charge of court see 11 FED. REP. 377.

This was a suit upon a policy of insurance upon the life of C. S. Alford, deceased. The application upon which said policy was issued was signed by the applicant, and contained the following clause, viz.:

"And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company, the fullness of which statements and representations I do hereby warrant, and that if the same or any of them are in any respect untrue the policy which may be issued thereon shall be void, and all moneys which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company at the home office named in the above application."

A copy of said application was attached to the policy when issued and delivered to the insured. The policy was not countersigned by the local agent.

At the trial plaintiff introduced evidence (all of which was objected to by the defendant) tending to prove that the agent of the defendant who took the assured's application had examined him upon the questions contained in said application, and had undertaken to fill out the blanks in the application with the applicant's answers; that the assured answered all questions truly, and that certain false answers contained in said application had been inserted therein by defendant's agent without the assured's knowledge; and that the latter had signed the application, supposing it contained his answers as given.

Defendant's motion for a new trial was upon the following among other grounds: That under the stipulations of the contract between the parties it was erroneous to admit testimony of declarations made to the soliciting agent; that in the absence of evidence of fraud or imposition it was error to submit to the jury the question whether the application was knowingly signed; that the court erred in refusing to charge that plaintiff's testator, by accepting the policy sued on, with copy of the application signed by him as part thereof, was not bound by the statements and answers contained in it; that there was error in excluding testimony offered by defendant.

Carr & Reynolds, for plaintiff.

Overall, Judson & Tutt, for defendant.

TREAT, D. J. As heretofore stated, the pleadings led the court to make many erroneous rulings concerning the admission and rejection of testimony. An effort was made in the instructions, by the consent of the plaintiff, to avoid such errors, the rulings having been mainly against the plaintiff. But the defendant is before the court to take advantage of erroneous rulings, which he has a right to do. Hence this court, admitting its errors during the trial, must grant the motion.

The more important propositions submitted by the defendant the court does not now pass upon, although its impressions with respect thereto are strongly against the defendant. If a foreign corporation transacts business in Missouri by virtue of its laws, can it, by clauses inserted in its policy, take itself out of the force of Missouri laws? It is not proper to discuss that question now. But for the errors committed as to the rejection and admission of testimony objected to, the court would so rule as to compel a decision on the main question, viz., whether a foreign insurance company doing business in Missouri can escape the consequences of the Missouri statutes by any terms or contrivances, written or oral, for that purpose. It is to be regretted that this case must be tried again, and it is to be desired that before the next trial the pleadings, by proper motion, may be made to raise questions of fact alone, so that the court may be duly advised as to what facts are committed to the jury, reserving to the court the legal propositions arising.

Motion for new trial is sustained.

LARWELL v. STEVENS.

(Circuit Court, W. D. Missouri, W. D. October, 1880.)

1. EJECTMENT—ADVERSE POSSESSION.

To defeat the title of the plaintiff the possession of the defendant must be adverse—that is, in hostility to the title of the owner; for if the possession is held by mere indulgence and by consent of the owner, and the defendant understood this, and acquiesced, the possession is not adverse.

2. SAME—STATUTE OF LIMITATIONS—POSSESSION MUST BE EXCLUSIVE.

The possession, in order to avail the defendant under the plea of the statute of limitations, must be an exclusive possession, and not held within 10 years prior to the commencement of the suit, in conjunction with one who was the real owner.

3. SAME—POSSESSION FOLLOWS TITLE.

The possession follows the title, and, if the owner and others are in possession, the law considers the owner as in possession.

4. DAMAGES—MEASURE OF.

The damages consist of the value of the property by way of rents during the time the possession has been withheld.

KREKEL, D. J., (*charging jury.*) The plaintiff, Larwell, brings this action to recover the possession of real estate in Kansas City, on which the defendant, Stevens, resides. To make out his case he presents sundry conveyances embracing the property in controversy. The objection raised on the introduction of these title papers having been overruled, it may be taken that they tend to show title in plaintiff, and, if the deeds are found to be genuine, vest the title in the plaintiff. To defeat the title of plaintiff, the defendant pleads the statute of limitations; that is, he says he has been 10 years at least in the actual, continuous, *exclusive*, and visible possession of the property sued for, and has thereby acquired such a right as will defeat the plaintiff's action. In the first place it is proper to call your attention to the fact that the *defendant* must establish the fact of the possession claimed. The possession must also be adverse—that is, in hostility to the title of the real owner; for if the possession is held by mere indulgence and by consent of the owner, and the defendant understood this, and acquiesced, the possession is not adverse. A possession while so held cannot ripen into a title which will defeat the true owner of his right, because it is not adverse and hostile. As already stated, the possession, in order to avail the defendant, must be an exclusive possession; that is, he must not have held it within 10 years prior to the commencement of the suit, in conjunction with one who was the real owner of it. If the real owner and the claimant of the possession, within 10 years prior to the bringing of the suit, had joint possession of the premises sued for, such a possession will not avail this defendant. The possession follows the title, and, if the owner and others are in possession, the law considers the owner to have the possession. If you shall find from the evidence that this defendant was, at any time within 10 years prior to the bringing of this suit, in joint possession with his son, and that the son was the owner, and claimed title to the property in controversy to the knowledge of the defendant, Stevens, then the plea is not good. The plea of the statute of limitations for the possession must be exclusive, and not joint, with one having the title to the property of which they are in joint possession. If you find from

The testimony that the title to the property in controversy was held by any one within 10 years prior to the bringing of this action, with the intention and for the purpose of giving a home to the defendant, and the defendant knew and consented thereto, such holding is not adverse, and is not in hostility to the title of the owner, and the statute of limitations will not avail the defendant. A title by the statute of limitations may be said to be the continued accretion of time from day to day until 10 years are complete. During all this time the defendant must have been in open, notorious, visible, and exclusive possession of the premises. In order to determine whether the possession was an adverse possession,—that is, whether defendant claimed title in himself,—you will examine all the acts, doings, and sayings of the defendant pertaining to the possession of the premises. Thus the act of defendant in writing the deed of trust or mortgage by which the title to the premises in controversy was to be affected, is to be examined by you for the purpose of determining whether the defendant's possession was not in harmony rather than in hostility to the title of the owner. The non-payment of the taxes for a great length of time, and the reason given for not making such payment, and the failure to pay, or offer to pay, any part of the taxes after they had been paid, if such failure occurred, insurance and dealing with the loss recovered, will all be carefully examined by you in order to determine the nature of the possession held by Stevens, and whether the same was adverse and in hostility to the title of the owner, or in harmony with it. While the title, growing up under the statute of limitations during the 10 years, becomes available to Stevens, if such possession is in hostility and not in harmony with the title of the owner, you may closely look at sayings and doings of the party who seeks to deprive the true owner of his right by mere possession in order to learn his intention. If such sayings and doings tend to nurse the young and growing title, you may arrive at a conclusion favorable to the defendant. But if any of these sayings and doings tend in the opposite direction, and indicate that the acquiring of a title by possession was not in the mind of the possessor, we may justly and properly arrive at an opposite conclusion, and adverse to the claim set up. You will thus go over the whole of the testimony, and present your conclusions in your verdict. If you find for the plaintiff, you will say in your verdict what the amount of damages are from the day of the bringing of the suit up to the time of rendering your verdict. These damages consist of the value of the property

by way of rents during the time the possession has been withheld. You will also find and state in your verdict what is the monthly value of the premises. If you find for the defendant, you will so state in your verdict.

The jury returned a verdict for the plaintiff.

OSTRANDER v. MEUNCH.

(Circuit Court, E. D. Missouri. March, 1881.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

An assignment for the benefit of creditors under a state law is void as against an assignee in bankruptcy under the national bankruptcy act; but it is not absolutely void *ab initio*, but only subject to be avoided by proceedings taken under the bankrupt act.

2. SAME—TITLE IN ASSIGNEE.

The title to the estate passes to the assignee in bankruptcy at the time of the conveyance of the assets to him, and the assignee under the state law ceases from that time to have any power to dispose of or appropriate them in any manner; and a demand on the latter in writing for the estate is sufficient without an application for an injunction to restrain him from disposing of the assets of the estate in his hands.

In Bankruptcy. Appeal from the judgment of the district court. Mr. Krum, for appellant.

MCCRARY, C. J. It is well settled that an assignment for the benefit of creditors under a state law is void as against an assignee in bankruptcy under the national bankrupt act. But it seems that the assignment under the state law is not absolutely void *ab initio*, but only subject to be avoided by proceedings taken under the bankrupt act.

In the present case it appears that the assignee, under the state law, had taken possession of the estate and partially executed the assignment prior to the adjudication in bankruptcy. The assignee in bankruptcy, soon after being qualified and receiving a conveyance of the estate from the register, made formal demand in writing upon the assignee, under the state law, for the estate. The latter, however, continued to dispose of a part of the estate by paying therefrom certain dividends. The court below instructed the jury that this he had no right to do, and that he was consequently liable to the assignee in bankruptcy for the assets in his hands at the time the demand was made. It is said that the assignee in bankruptcy was bound to

enjoin the further proceedings under the state law, and that he is therefore not entitled to recover for the amount paid out as dividends after demand. This point is not well taken. The title to the estate passed to the assignee in bankruptcy before he demanded it. From the time of the conveyance of the assets to the assignee in bankruptcy the latter was their owner, and the assignee under the state law ceased to have any power to dispose of them or appropriate them in any manner. It was the case of property belonging to one person, and found in the possession of another. No injunction was necessary. A demand was quite sufficient. There is no error in the proceedings, and the judgment of the district court is accordingly affirmed.

SCHMIDT v. FREESE.

(Circuit Court, E. D. New York. May 10, 1882.)

1. PATENTS FOR INVENTIONS—ESSENTIAL ELEMENT LEFT OUT.

In a claim for a combination, one essential element whereof is an intermediate lever, a machine which omits the essential element of an intermediate lever, and substitutes another, whereby the same result is accomplished in a different manner, does not infringe the patent.

2. SAME—NOT A COLORABLE MODIFICATION.

Where the difference in the action of the two machines is substantial, the defendant's arrangement is not a colorable modification of plaintiff's arrangement, and is not an infringement.

F. von Briesen, for plaintiff.

Van Santvoord & Hauff, for defendants.

BENEDICT, D. J. This action is for an injunction and account. It is based upon two letters patent for improvements in feed mechanism for button-hole sewing-machines. A form of machine conceded to be made and sold by the defendant is alleged to infringe both the patents set forth in the bill. The defendant denies the infringement, and also disputes the validity of the patents. The first patent set forth in the bill is No. 197,528, dated November 27, 1877. This patent has seven claims. Infringement of the second and fifth claims is charged, but the charge as to the fifth claim has been abandoned, leaving the second claim only to be considered here.

The object of the invention set forth in this claim is to simplify the mechanism for imparting motion to the feed-wheel of a button-hole sewing-machine. The specification refers to a former patent, No. 183,333, and states that instead of the jointed lever described in such

former patent as a means of transmitting to the feed-wheel the motion of a rotary shaft, the patentee has invented a system of independent levers. A particular description of these levers is given in connection with drawings attached. One of these levers, E, which is pivoted to the frame of the machine, and subjected to the action of two toes that project from a rotary shaft, is termed the "operating shaft." When this lever is oscillated by means of the rotating shaft its motion is transmitted to another lever, D, termed the "intermediate lever." This intermediate lever, when oscillated by the action of the operating lever, in turn transmits its motion to a sliding feed-dog, by which an intermittent rotary motion is imparted to the feed-wheel.

The words of the claim are as follows: "The sliding feed-dog, C, combined with the intermediate lever, D, operating lever, E, and with the shaft, F, leaving the toes *l* and *m* substantially as specified." This claim is for a combination of old devices. Friction feeds, as distinguished from ratchet feeds, moved by a rotating shaft, have long been employed in sewing-machines. Similar devices to those employed by the plaintiff have often been used to produce similar results. All that is claimed to be new in the plaintiff's invention is the particular combination described in the patent.

In the machines made by the defendant the feed-wheel is made to rotate by the action of a sliding feed-dog, as in the plaintiff's machine. The motion of the feed-dog is effected by the action of a rotating shaft in connection with an operating lever, as in the plaintiff's machine, but the defendant dispenses with the "intermediate lever" which the plaintiff employs. By changing the relative position of the operating lever and the feed-dog, a sliding link is employed to transmit the motion of the operating lever to the feed-dog, instead of an intermediate lever. Here lies the point of the controversy. The plaintiff contends that the sliding link employed by the defendant is in fact a lever, and the intermediate lever of the plaintiff's combination, while the defendant insists that his sliding link is in no sense a lever, but a different thing, the employment of which changes the combination. Upon this question my opinion is in favor of the defendant's contention. I consider it plain that in the defendant's machine there is no lever intermediate the feed-dog and the operating lever. There is a piece intermediate the feed-dog and the operating lever employed to transmit the motion of the operating lever to the feed-dog, but that piece is not a lever in any sense of the term. It has no fulcrum, and its slight vibrating motion is opposite to the direction in which the end of the lever by which it is operated moves.

The plaintiff's expert disposes of this question adversely to the plaintiff when he says (plaintiff's record, p. 177) "the necessities of the motion of the feed-dog alone causes the vibration of the piece on its pivot." This conclusion, that the sliding link of the defendant's machine is not a lever, is decisive of the case so far as the patent under consideration is concerned, for there is no evidence on which to found a conclusion that the defendant's sliding link, not being a lever, is nevertheless an equivalent for the plaintiff's intermediate lever. Indeed, reliance upon the doctrine of equivalents was expressly disclaimed at the argument, and the case, so far as the patent under consideration is involved, was made to depend upon the question whether the defendant's sliding link is a lever. My determination, therefore, is that the plaintiff has failed to prove infringement of the second claim of the plaintiff's patent of 1877.

The complainant's second patent, No. 219,656, dated September 16, 1879, relates to improvements on the mechanism described in letters patent which have just been considered, and in patent No. 183,333, dated October 17, 1876. The invention described in this 1879 patent is stated to consist in "a new mechanism for regulating the length of stitch." All the mechanism covered by the second claim of the patent of 1879 is retained, and the necessary change in motion of the feed-wheel from fast to slow is effected by the interposition between and its withdrawal from between the two contact surfaces of the operating lever, E, and the intermediate lever, D, of one arm of an elbow lever, J, which is pivoted upon the face of the operating lever next the face of the intermediate lever. The end of the operating lever, E, in contact with the intermediate lever, D, is step-shaped, and the arm of the elbow lever is interposed in such a manner that it partly closes or equalizes and fills out the step, whereby the outline of the contact surface of the operating lever is changed, and, in consequence, the vibration of the intermediate lever is changed. This interposition and withdrawal of the arm of the elbow lever is effected by vibrating the elbow lever upon its pivot. To this end its second arm is by an elastic rod, I, connected to a lever, H, which is caused to swing by means of a pin, t, entering a groove, a, in the feed-wheel.

There are three claims. The *first* claim is as follows: "The combination of the lever E and lever D with the intermediate pivoted elbow lever, J, and with mechanism for vibrating the said parts on their respective pivots, substantially as herein shown and described." The *second* claim is as follows: "The combination of the lever, H,

elastic rod, I, with the pivoted elbow lever, J, and with the levers, E, and D, and with mechanism, F, *e, m*, for oscillating the lever, E, substantially as herein shown and described." The *third* claim is as follows: "The lever, E, having fixed contact portion, *i*, and elbow lever, J, in combination with the lever, D, and with the spring rod, I, passing through the elbow lever, J, and with the lever, H, grooved wheel, B, and actuating shaft, F, substantially as herein shown and described."

It will be observed that each of these claims is for a combination, one essential element whereof is the intermediate lever, D, already noticed in considering the plaintiff's patent of 1877. The conclusion already announced, that the defendant's machine has no intermediate lever, affords one ground, therefore, for holding that such machine does not infringe the patent of 1879, because it omits one element of the combination claimed in that patent, by which motion is imparted to the feed-dog, and substitutes another, whereby the same result is accomplished in a manner different from that described in the patent.

There are, besides, other grounds to be found in the difference between the mechanism employed by the plaintiff to secure a fast and slow motion of the feed-wheel, and the mechanism employed by the defendant to secure the same result. As has been already noticed, the elbow lever employed by the plaintiff to change the motion of the contact end of the operating lever is pivoted upon the face of the operating lever next the face of the intermediate lever, and moves in the direction of the contact plane. From this method of construction two difficulties arise. One difficulty, not wholly insignificant, is that the elbow lever when so pivoted is liable to work loose upon its pivot; another, more important, is that the free arm of the elbow lever may be moved by the lever, H, to interpose between the operating and the intermediate lever before those levers have separated sufficiently to permit such interposition, in which case breakage must result unless provision be made for a yielding of the parts. To obviate this difficulty the plaintiff employs an elastic rod to transmit motion from the lever, H, to the elbow lever. This rod, by springing when the contingency suggested arises, avoids breakage. Both the difficulties alluded to are avoided in the defendant's machine. Instead of interposing one arm of an elbow lever, pivoted upon the operating lever, for the purpose of changing the outline of the contact surface of the operating lever, the defendant employs an elbow lever to move a sliding cam upon the operating

lever, which cam, by sliding in the direction in which the part to which it transmits motion moves, changes the outline of the contact end of the operating lever, and thereby changes the speed of the feed-wheel. By this arrangement the interposing piece or cam can be, and is, kept steady in its slide, without danger of working loose, and all danger of any obstacle being prevented to its action whenever moved by the lever, H, is removed. There is, therefore, no need in the defendant's machine of an elastic rod, I, such as is employed in the plaintiff's machine, and this feature, which is an essential element of the plaintiff's combination, is dispensed with.

The court has been pressed to say, from an inspection of the defendant's machine, that the connecting rod employed to transmit motion from the lever, H, to the elbow lever is so made as to be elastic; but this cannot be said, especially in view of the fact that there is no necessity requiring the rod to be elastic, and the positive testimony that the rod is not a spring rod, and does not yield in the direction in which it transmits motion. These differences in the action of the two machines which I have thus endeavored to point out are, in my opinion, substantial, and sufficient to compel the conclusion that the defendant's arrangement is not a colorable modification in form of the plaintiff's arrangement for regulating the length of stitch, but entitles the defendant's machine to be considered as substantially different from the plaintiff's, and not an infringement upon any of the claims of the patent under consideration.

The bill must, therefore, be dismissed, and with costs.

TYLER v. GALLOWAY and others.

(Circuit Court, N. D. New York. April 1, 1882.)

1. PATENT FOR INVENTIONS—REISSUE—ENLARGING CLAIMS.

Where plaintiff in obtaining a reissue introduced an inexact claim, which if construed according to its natural meaning would include an invention broader than the one which was made, the patent is improperly enlarged.

2. REISSUE—VOID CLAIM—DISCLAIMER.

One claim in a reissue may be void without necessarily invalidating the other claims. In such case it is proper to disclaim the void claim.

George W. Hey, for plaintiff.

H. R. Durfee, for defendants.

SHIPMAN, D. J. This is a bill in equity to prevent the infringement of reissued letters patent granted August 5, 1879, to the plaintiff, as assignee of William Sternberg, for an improvement in cheese hoops. The original patent was granted to Sternberg March 21, 1871. The object of the bill is to prevent the use of cheese hoops known as the "Frazer hoop," which are made under the patent granted to William B. Frazer January 9, 1872.

The questions which are involved in this case, viz., the validity of the plaintiff's reissued patent and the infringement by the use of the Frazer hoop, were decided in June, 1880, by Judge Wallace, in the case of *Tyler v. Welch*, 3 FED. REP. 636. At the suggestion of Judge Wallace, this case was heard by another judge, as it was thought that the recently-decided cases of *Miller v. Bridgeport Brass Co.* 3 Morr. Trans. 419, and *Campbell v. Wright* present the question of the validity of the reissue in a new light.

The nature of the Sternberg invention, the difference between the original and reissued patents in the descriptive part of the respective specifications, and the method of construction of the two hoops, are fully described in *Tyler v. Welch*, *supra*. I entirely concur with Judge Wallace, and for the reasons which he gives in his conclusions, that the Frazer hoop is an infringement of the second claim of the reissued patent, and that there is no new matter either in the descriptive part of the specifications or in the second claim of the reissue. This claim is a substantial reproduction in different phraseology of the single claim of the original patent. The original claim was as follows: "The grooved hoop, A, *a*, in connection with the expansible ring, B, substantially as and for the purpose herein specified."

The two claims of the reissue are as follows:

"(1) An expansible ring or band, in connection with the upper part of a cheese hoop, to hold the upper edge of the bandage while being filled with curd, and during the process of pressing, substantially as specified. (2) The combination of the expansible ring or band and the cheese-hoop, grooved or depressed sufficient to receive said ring or band, so that it will not interfere with the follower, substantially as specified."

Judge Wallace was of the opinion that the first claim of the reissue was capable of a broader construction than Sternberg's invention warranted, but was disposed to limit the claim so that it should only cover the actual invention. While such limitation is in accordance with the existing rules of construction, yet, in view of the recent decisions of the supreme court, and of the fact that in this case, with

such a construction, both claims of the reissue would be the same, but especially in view of the late decisions, I think that such a course is not advisable, and that the claim should be declared void.

The plaintiff in obtaining a reissue introduced an inexact claim, which, if construed according to its natural meaning, would include an invention broader than the one which was made. If such a construction should be adopted the patent would be improperly enlarged. If on the other hand a limited construction should be given, the first claim would be substantially the same as the second, and would be superfluous. One claim in a reissue may be void without necessarily invalidating the other claims. In such case it is proper to disclaim the void claim. *O'Reilly v. Morse*, 15 How. 62; *Schillinger v. Gunther*, 17 Blatchf. 66. In this case there has been no unreasonable neglect or delay.

Whenever the plaintiff shall have satisfied the court that a proper disclaimer has been filed in the patent-office disclaiming the first claim in such manner as to claim only the invention as specified in the second claim of the reissued patent, a decree will be entered for an injunction against the infringement of the second claim, and for an accounting of profits and damages arising under said infringement, but without costs.

THATCHER HEATING Co. v. BURTIS and others.

(Circuit Court, S. D. New York. 1882.)

PATENTS FOR IMPROVEMENTS—WANT OF NOVELTY.

The merely advantageous bringing together of parts which do not co-operate to produce a new result, and which by their aggregation contains the advantages which resulted before separately in several structures, is not a patentable novelty.

B. F. Lee, for complainants.

A. J. Todd, for defendants.

WALLACE, C. J. This action involves the validity of the first and second claims of the letters patent issued to John M. Thatcher for an improvement in fire-place heaters, bearing date June 14, 1870. It is conceded that these claims are to be construed broadly, so as to cover the combination of a fire-place heater having a body projecting outwards from the mantel or frame, and a furnace-like portion in the chimney behind the mantel, with a fuel receptacle within

the cylinder of the heater which will preserve a supply of unignited coal while the heater is in operation, and an opening through which the magazine can be fed from above, the magazine extending to this opening. Inasmuch as the heater was old and the fuel receptacle with the described opening was old when located within an ordinary coal stove, what Thatcher accomplished was merely the advantageous location of the fuel receptacle within the fire-place heater. As the complainant's expert, Mr. Brevoort, states: "The problem Thatcher had before him was to place this fuel magazine within the Bibb & Auger heater."

It must be conceded that it was not obvious that such a fuel magazine could be advantageously employed in such a heater. Attempts had been made by others to do the same thing without satisfactory results, but Thatcher's organization was a success, and immediately commended itself to the public. But Thatcher's broad claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization, but there was none in merely bringing those parts together. They did not perform any new function in the new arrangement. The fuel magazine does just the same work in the new structure it did in the ordinary coal-stove. All the other parts of the fire-place heater operate precisely as they would if the ordinary fuel pot were used instead of the substituted magazine. The parts do not co-operate to produce a new result. By their aggregation the new structure contains all the advantages which resided before separately in several structures. The new heater is therefore a better heater than any which preceded it, but it does not present a patentable combination irrespective of the means employed to adjust the several parts into efficient relations to each other.

As, concededly, the claims of the patent are not to be limited to any such combination, they must be held void for want of patentable novelty.

The bill is dismissed with costs.

THE DELAWARE.

(District Court, S. D. New York. May 9, 1882.)

1. COLLISION—DUTY OF TUG AS TO SAFETY OF TOW.

Though a vessel be anchored at an improper place, a steam-tug, with a long tow upon a hawser astern, is not justified in passing her and entering a strong current, which is obviously likely to swing the tow against the vessel at anchor, if there be any other less dangerous alternative. It is the paramount duty of a tug to consult the safety of her tow, and to run no avoidable risk.

2. ANCHORING IN WRONG PLACE—NOT TO EXCUSE NEGLIGENCE IN STEAMER PASSING.

Where the steamer C. came to anchor from 1,000 to 1,500 feet to the westward of Governor's Island, at the mouth of the East river, when, as contended by the claimant, she was 600 to 700 feet off the port quarter of the steam-tug D., having in tow, upon a hawser 390 feet long, six tiers of canal-boats, and the tide from the East river was at the strength of the ebb, and the danger of the tow's swinging against the steamer was perceived in case the steam-tug should proceed to cross the strong ebb tide, and there being no other reason for not dropping astern than the fear that the hawsers might foul, and the steam-tug D. having three smaller tugs as helpers at her command, but the steam-tug nevertheless proceeded to cross the strong current of the ebb tide under a hard a-port wheel, but was unable in so doing to prevent the libellant's boat in the fourth tier from swinging against the steamer, whereby it was sunk, *held*, that the excuse given was insufficient; that the tow might and should have been taken astern; and that the steam-tug was answerable for the loss. *Held, also*, that it was the duty of the steam-tug, if it was believed that the steamer C. had come to anchor at an improper and dangerous place, her steam being still up, to give danger signals before going on, in order that the steamer might be notified to change her position, there being sufficient time to do so.

Benedict, Taft & Benedict and *S. H. Valentine*, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BROWN, D. J. The libel in this case was filed by the owner of the canal-boat *Cecilia*, to recover damages for the sinking of his boat by a collision in the afternoon of July 13, 1877, with the Spanish steamer *Carolina*, lying at anchor off Governor's island, at the mouth of the East river.

The *Cecilia* was one of a tow of 28 canal-boats in charge of the steam-tug *Delaware*, a powerful tug of 180 feet in length, bound from New Brunswick to the Stakes above Jersey City, by way of the Kilns and the upper bay. The tow consisted of five tiers of boats, having five boats in each tier, and a sixth tier of three boats, all lashed together, and drawn by the *Delaware* upon hawsers 390 feet long. The entire length covered by tug and tow was about 1,180 feet. The *Cecilia* was the outer boat upon the port side in the fourth tier. The arrival of such tows is usually timed so as to cross the mouth of the

East river at the last of the flood. On this trip the Delaware was belated, so that the ebb-tide from the East river, which is considerably earlier than the ebb from the North river, and which sets diagonally across towards the Jersey flats in a southwesterly direction, was already at its full strength. As is usual in such cases, the tug and tow came up in the slack-water along the west side of Governor's island, and the tow, which was nearly 100 feet wide, passed about 300 feet to the west of Castle William. As they entered the strong current of the ebb tide immediately after passing the fort, the tow was swung around to the westward, and the libellant's boat was carried with such force against the stem of the steamer Carolina as to cause his boat to sink almost immediately.

The Carolina lay at anchor from 1,000 to 1,500 feet off the fort, on the line of Ellis' island, or perhaps a little above that line. All of the libellant's witnesses testify that the Carolina had come to anchor from a quarter to half an hour before the Delaware had reached her. Several of these witnesses were disinterested, competent, and in a situation to observe carefully; especially the witness Brainard, who testified that he passed the Carolina with his tug as he went down to the tow from Jersey City, and that she had already anchored some time before the Delaware reached her. Unless these witnesses are wholly mistaken, it is clear that the Delaware was in fault for undertaking to go between the fort and the steamer without such arrangements as would make sure of keeping the tow from swinging against the steamer.

Numerous witnesses on the part of the claimant, however, testify that the Carolina came up astern of the tow, and upon the west or port side, but at no time passed the Delaware; and that she dropped her anchor unexpectedly and without warning, when her bows had lapped the Delaware's port quarter about up to her wheel-house, at a distance from her of about 600 feet to the westward, as the captain estimates, or about 700 feet, according to the pilot. The particularity with which the testimony on this subject is given by the different witnesses makes it difficult to reject the testimony on either side. I can perceive no way of reconciling them except upon the supposition that the different witnesses are referring to two different steamers, which seems to be rendered the more probable from the testimony near the close of the case, from which it appeared that the hull of the Carolina was red, while another steamer, somewhat astern, and 500 or 600 feet further to the westward of the Carolina, had a black hull with a red streak near the water's edge. A number of witnesses

testify to this second steamer being thus anchored a little astern and to the westward of the Carolina, while others did not notice more than one; and some of the witnesses, who speak of seeing but a single steamer, described her as having a red hull, while others speak of her as having a red stripe only.

Assuming, however, the account of the matter as given by the witnesses on the part of the claimant to be true, I am, nevertheless, not satisfied, after a careful consideration of the testimony, that the Delaware, and those in charge of the tow, performed their whole duty as careful and prudent navigators, so as to exempt the Delaware from liability.

The pilot states that when he saw the anchor dropped by the Carolina he thought there might be a collision. From that moment, therefore, whether the Carolina was justified in anchoring as she did, and in the place where she did, or not, the paramount duty of the Delaware was to secure the safety of her tow, by any and every means in her power, and to run no avoidable risk; nor could she, except at her own peril and risk for any injury that might ensue, proceed against the strong ebb-tide with the certain and obvious danger of the tow's being swung against the steamer at anchor, unless there were no other alternative involving less obvious danger. *The Jessie Russell*, 5 FED. REP. 639; *The Brooklyn*, 2 Ben. 547, 552-3; *The Baltic*, Id. 452; *The Lady Franklin*, 2 Low. 220. The fault of the Carolina, if fault there was, would not in such a case be any defence to the Delaware, if the latter had still left any practicable means of avoiding the peril. *The Atlas*, 93 U. S. 302; *The Juniata*, Id. 337.

I am satisfied from the evidence that the Delaware was not, in this case, precluded from any other alternative than going on at the evident risk of the tow's colliding with the Carolina; but that she might and should, as the most prudent course, have permitted her tow to drop astern; and that with the help at the command of the Delaware, and in the circumstances and positions of the vessels, there was nothing to prevent this being safely done. The Carolina was some 600 or 700 feet distant to westward from the Delaware, and lapped her nearly half her length. The other steamer was but little astern of the Carolina, and 400 or 500 feet further to westward. The Delaware had not ported her wheel at this time, but was heading for the battery, and her helm was not ported so as to turn eastward against the ebb-tide, as the libel alleges, and as the captain and pilot both testify, until the Carolina was thus seen to drop her anchor. The hawser was 390 feet long; so that the head tier of the tow had not reached

the Carolina at that time, and had plenty of space to keep clear of both of the two steamers at anchor had the Delaware stopped and allowed the tow to drop astern. The only reason assigned by the pilot for not stopping was that the hawser might thereby have fouled. There were at the time two other small tugs, one on each side of the hawser tier of the tow, as well as the Jessie, a third helper, on the starboard side of the Delaware. With these helpers, which were able to maneuver quickly, I cannot believe that there would have been any difficulty in guiding the tow backwards out of any danger had the Delaware preferred not to take the risk of keeping on, notwithstanding the unexpected anchoring of the Carolina off her port quarter. From some cause not explained the Delaware was behind time, so as not to pass Governor's island and the mouth of the East river upon the last of the flood, as was intended, and as she ordinarily would have done. The Carolina may have been at fault in anchoring at the place and time she did; it was allowable for her to anchor within 1,200 feet of the fort. There was no one to represent her case upon this trial, and upon the evidence here given it is not certain that she was not that distance from the fort. But if her casting anchor at the time and place she did was an act of certain danger to the Delaware and her tow, signals might have been easily given to her from the Delaware, which was not done. Had they been given, and had the danger been obvious, it can hardly be supposed that the Carolina would have changed her position, as she had steam up, and there was sufficient time to do so before the collision occurred. *O'Neil v. Sears*, 2 Spr. 52; *The Petrel*, 6 McLean, 491.

It must be held, therefore, that the Delaware kept on her course voluntarily, instead of dropping astern, as she might and should have done, and that she trusted to her own ability to proceed and keep her tow clear of the steamer. She must therefore be held answerable for the result. *The Scots Greys*, 5 FED. REP. 369.

One of the helpers, after considerable delay, proceeded, though too late, to the port side of the tow to assist in shoving it more to starboard. No reason appears why this was not done earlier.

On the whole, as the libellant's boat was free from blame and completely subject to the navigation of the Delaware, I think the latter must be held answerable for the loss.

The libellant should have judgment, with costs, with a reference to compute the damages.

THE GEORGE H. DENTZ.

(District Court, E. D. New York. June 26, 1882.)

INEVITABLE ACCIDENT—ADOPTING DANGEROUS COURSE.

Where the pilot of a vessel, without necessity, adopts a dangerous course, and fails in his purpose, he must bear the responsibility.

W. W. Goodrich, for libellant.

Carpenter & Mosher, for the insurance company, co-libellant.

E. G. Davis, for claimant of the tug.

BENEDICT, D. J. I am of the opinion that upon the evidence it cannot be held that the tug proceeded against has excused herself for moving so near the South Brother island, in Long Island sound, with her tow, that the libellant's boat brought up on the rocks. The only excuse attempted to be proved is the breaking of the propeller's rudder chain. The positive evidence in regard to the breaking of the chain seems sufficient to prove that the chain did break; but when it broke is not so clear. The failure, at the time of the accident, to mention the breaking of the chain, the circumstances under which the pilot in charge of the propeller left her, and the omission to mention the breaking of the chain in the answer as originally filed, nor until a second answer was compelled by exceptions, have led me to the conclusion that the breaking of the rudder chain was not the cause of the accident. I have not overlooked the testimony of the pilot as to his mention of the chain at the time of the accident, but plainly he did not state what he says he did; or if he did, then the statement was not true, for at that time the chain was not broken. The real cause of the tow's hitting the rocks, no doubt, was a misconception on the part of the pilot of the propeller in respect to his location. But the same result follows from the testimony of the pilot of the tug; for, according to the pilot, he met a sailing vessel which crowded him into a tight place, and compelled him to port his wheel, and brought him south-west of the passage between the Brothers, so that a sharp sheer was necessary in order to regain his proper position. In making this sheer his rudder chain broke, and before he could repair his chain he was too near the rocks to clear them. This statement shows that the pilot held on his course, porting his helm for the sailing-vessel, in force of the passage between the Brothers, when he should have stopped. By holding on and porting, he placed himself in a position, according to his own statement, where, if his rudder chain happened to break, he must go ashore; and such an accident

is not infrequent, as the testimony shows. There was no necessity for him to take this risk. The maneuver was dangerous, as the result proved. Having without necessity adopted a dangerous course, and having failed, he must bear the responsibility.

UNITED STATES *v.* ROSE.

(Circuit Court, S. D. New York. June 7, 1882.)

1. SHIPPING—OBTAINING EMPLOYMENT FOR SEAMEN.

A person who is not a shipping commissioner is not authorized to charge any fee for shipping seamen.

2. SAME—PENALTY.

In an action for the penalty for shipping seamen without authority, and demanding a remuneration therefor, it is for the defendant to show himself within the exception stated in the act of congress.

The U. S. Dist. Atty., for plaintiff.

Goodrich, Deady & Platt, for defendant.

WALLACE, C. J. It was error to require the plaintiff to show anything further than that the remuneration demanded by defendant for obtaining employment for the seamen was of a prohibited character. This was shown when it appeared that the defendant was not a shipping commissioner, and therefore was not authorized to charge any fee for shipping seamen. Conceding, for the purpose of this case, that the penalty is not recoverable when the seamen are shipped in vessels of the class mentioned in the act of June 9, 1874, it was for the defendant to show himself within the exemption, and it was not incumbent on the plaintiff to negative the existence of the exculpatory facts. *Spieres v. Parker*, 1 Term, 141; *Sheldon v. Clark*, 1 Johns. 513; *Bennet v. Hurd*, 3 Johns. 438; *Hart v. Cleis*, 8 Johns. 33.

Motion for new trial granted.

LE GRAND v. UNITED STATES.

*(Circuit Court, E. D. Texas. July 6, 1882.)***CONSTITUTIONAL LAW—AMENDMENTS INHIBITING STATE LEGISLATION.**

Where a state has been guilty of no violation of the provisions of the thirteenth, fourteenth, and fifteenth amendments to the constitution of the United States, no power is conferred on congress to punish private individuals who, acting without any authority from the state, and it may be in defiance of law, invade the rights of the citizen which are protected by such amendments. So, where an act of congress is directed exclusively against the action of individuals, and not of the states, the law is broader than the amendments by which it is attempted to be justified, and is without constitutional warrant.

Error to the District Court for the Eastern District of Texas.

On October 11, 1881, the United States attorney for the eastern district of Texas filed an information against Israel Le Grand, the plaintiff in error, William Ridley, and William Laney, in which it was charged that on May 31, 1881, in the county of Camp, and within the eastern district of Texas, the plaintiff in error and the said Ridley and Laney did conspire together and go in disguise upon the premises of one Dennis Bolton, a free male citizen of the United States, and of the state of Texas, who was of the African race and descent, and of the black complexion, for the purpose of depriving him of the equal protection of the laws of the United States and of the state of Texas on account of his said race and color, and especially for the purpose of depriving him, the said Bolton, on account of his said race and color, of his right and privilege to give evidence in a certain criminal prosecution pending before one J. T. Covington, a justice of the peace of said county of Camp, in the name of the state of Texas, against the said William Ridley and one Robert Carr, and to prevent the said justice of the peace from giving and securing to said Dennis Bolton the equal protection of the laws, to-wit, the right to testify in behalf of the state of Texas in said criminal prosecution, and to prevent the said justice from securing to him, the said Bolton, immunity from personal danger from and at the hands of said Ridley, Le Grand, and Laney; and that said defendants, for the purpose of effecting said conspiracy, having gone upon the premises of said Bolton, did upon said premises assault and shoot and inflict great bodily harm upon the person of the said Bolton. Only one of the defendants named in the information—namely, the plaintiff in error—was arrested by the marshal. He was arraigned, and pleaded not

guilty, and was put upon trial. The jury returned a verdict of guilty, and he was adjudged by the court to pay a fine of \$500, and to be imprisoned, at hard labor, for the term of five years in the penitentiary at Chester, in the state of Illinois. This writ of error is prosecuted to reverse that judgment.

Charles A. Culberson, for plaintiff in error.

Edward Guthridge, U. S. Atty., for the United States.

WOODS, Justice. Many points have been presented by counsel for the plaintiff in error, in which a reversal of the judgment is demanded. Some of them are based upon alleged errors of the court in its charges to the jury. As the charges complained of are not incorporated in any bill of exceptions, but are inserted by the clerk without any authentication by the judge, they are not properly presented, and cannot be considered. There are, however, other grounds properly presented by motion in arrest of judgment, upon which a reversal of the judgment is asked. I am of opinion that one of these grounds is well taken; and as it is not only fatal to the judgment in this case, but also to any prosecution in a United States court for the acts charged in the information, it will be alone considered. The ground referred to was in substance as follows: Because the act of congress upon which the prosecution rests was passed without any constitutional warrant.

The law, the violation of which is charged in the information, is that part of section 2 of the act of April 20, 1871, (17 St. 13-14,) which now constitutes section 5519 of the Revised Statutes of the United States. It declares:

"If two or more persons in any state or territory conspire or go in disguise, on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both said fine and imprisonment."

The plaintiff in error insists that the constitution of the United States nowhere confers on congress the power to pass such an act, and the question for solution, therefore, is under what clause of the constitution, if any, can this legislation be sustained.

The fifteenth amendment can have no application. That amendment relates to the right of citizens of the United States to vote. It

does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Cruikshank*, 92 U. S. 542; S. C. 1 Woods, 322.

Section 5519 of the United States Revised Statutes has no reference to this right. The right guaranteed by the fifteenth amendment is protected by sections 4 and 5 of the act of May 31, 1870, (16 St. 141;) sections 5506, 5507, Rev. St.

It requires no argument to show that a law which, according to the theory of the prosecution, and which in fact is intended to protect among other things the right of the citizen to give evidence in the courts, cannot be based on an article of the constitution which simply protects the right of the citizen to the elective franchise against discrimination on account of his race, color, or previous condition of slavery. Nor can authority for this legislation under review be found in the fourteenth amendment to the constitution. The only part of that amendment which can have any bearing upon the question in hand is the first and fifth sections. The first section declares:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section declares: "The congress shall have power to enforce by appropriate legislation the provisions of this article."

It is perfectly clear, from the language of the first section above quoted, that when a state has been guilty of no violation of its provisions the section does not confer on congress the power to punish private individuals who, acting without any authority from the state, and it may be in defiance of its laws, invade those rights of the citizen which are protected by the amendment.

The scope of the two sections of the amendment above quoted has been defined in the supreme court of the United States in several cases. Thus, in *U. S. v. Cruikshank*, 92 U. S. 542, it was declared by the court, Mr. Justice Miller delivering its opinion, that the fourteenth amendment prohibits a state from depriving any person of life,

liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, and no more. The power of the national government is limited to the enforcement of this guaranty. So, in *Virginia v. Rives*, 100 U. S. 313, it was declared by Mr. Justice Strong "that the provisions of the fourteenth amendment [those above quoted] have reference to state action exclusively, and not to any action of private individuals." So, also, in *U. S. v. Cruikshank*, 1 Woods, 316, it was declared by Mr. Justice Bradley, speaking of the same provision of the fourteenth amendment:

"It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislation of the state, not a guaranty against the commission of individual offences; and the power of congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to passage of laws for the suppression of crime within the states. The enforcement of the guaranty does not require or authorize congress to perform the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform."

Recurring to section 5519 of the Revised Statutes we find that it is directed exclusively against the action of individuals, and not of the states; "if two or more persons in any state or territory conspire or go in disguise upon the highway or premises of another," etc. And the information in this case, which follows the statute, charges an offence against three private individuals. It is, therefore, evident that no warrant can be found in the fourteenth amendment for the passage by congress of section 5519 of the Revised Statutes.

The thirteenth amendment declares that "neither slavery nor involuntary servitude, except as a punishment of crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." Does this amendment clothe congress with the authority to pass the section under consideration? It may be conceded that this amendment

gives power to congress, not only to protect the personal freedom of the enfranchised citizens, but to remove from them every badge and restraint of slavery and involuntary servitude.

Congress has by virtue of this amendment declared "that all persons within the jurisdiction of the United States shall have the same right in every state and territory * * * to give evidence * * * as is enjoyed by white persons." Act of May 31, 1870, § 16, (16 St. 144; Rev. St. 1977.) The power of congress to do this has been recognized by at least two of the justices of the supreme court. Mr. Justice Swayne in *U. S. v. Rhodes*, 1 Abb. (U. S.) 28, and Mr. Justice Bradley in *U. S. v. Cruikshank*, 1 Woods, 308. Conceding, then, that congress had the power by virtue of the thirteenth amendment to confer on the persons enfranchised thereby the same right to testify as is enjoyed by white persons, and to punish the invasion of that right, the question remains, has that power been exercised by appropriate legislation by the passage of section 5519 of the Revised Statutes?

I feel constrained by the authority of the supreme court of the United States to say that it has not.

Under the section referred to, it would be an offence for two or more white persons to conspire, etc., to prevent another white person from enjoying the right and privilege of testifying in a court of justice. It would be an offence for two or more colored persons, enfranchised slaves, to conspire with the same purpose, against a white citizen, or against a colored citizen who had ever been a slave. It is, therefore, perfectly clear that the law is broader than the amendment by which it is attempted to be justified. It covers cases both within and outside of its provisions. The law under which two or more free white men could be punished for conspiring to deprive another free white man of the right to testify, cannot be based on the amendment which prohibits slavery and involuntary servitude.

The thirteenth amendment does not, therefore, authorize the law in question.

Upon this question the case of *U. S. v. Reese*, 92 U. S. 214, is in point. In that case the supreme court had under consideration the constitutionality of the third and fourth sections of the act of May 31, 1870, (16 St. 140; Rev. St. §§ 2007, 2008, 5506.)

The third section of this act made it an offence for any judge, inspector, or other officer of election whose duty it was under the circumstances therein stated to receive, count, etc., a vote of any citizen, to wrongfully refuse to receive and count the same; and the fourth section made it an offence for any person, by force, bribery, etc., or

other unlawful means, to hinder or delay, etc., any citizen from doing any act required to be done to qualify him to vote or from voting at any election.

The attempt was made to sustain these sections as warranted by the fifteenth amendment to the constitution of the United States. But the supreme court held it not to be appropriate legislation under that amendment. The ground of the decision was that the sections referred to were broad enough, not only to punish those who hindered and delayed the enfranchised colored citizen from voting on account of his race, color, or previous condition of servitude, but also those who hindered and delayed the free white citizen. The court, speaking by Mr. Chief Justice Waite, said:

"It would certainly be dangerous if the legislature could not set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained if within the constitutional grant of power. But if congress steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon must, annul its encroachments upon the reserved rights of the states and the people. And the court declared that it could not limit the statute so far as to bring it within the constitutional power of congress and concluded. We must therefore decide that congress has not as yet provided by appropriate legislation for the punishment of the offence charged in the indictment."

This decision is directly in point and shows that the section of the law upon which the information in this case is based is not warranted by the thirteenth amendment. It is true that the information alleges that the defendants conspired against Bolton on account of his race and color. But the act of congress cannot be helped by the information. If the law is without constitutional warrant, no averments of the pleader can give it vitality. There is only one other clause in the constitution of the United States which, in the remotest degree, can be supposed to sustain the section under consideration. I refer to section 2 of article 4, which declares the citizens of each state should be entitled to all the privileges and immunities of citizens of the several states. But this section, like the fourteenth amendment, is directed against state action. Its object was to place the citizens of each state upon the same footing with citizens of other states to relieve them from the disabilities of alienage in other states, and inhibit discriminative legislation against them by other states. *Paul v. Virginia*, 8 Wall. 168. It was never supposed that under it con-

gress could pass a law which would punish any private citizen for an invasion of the rights of his fellow-citizen conferred by the state of which both were residents.

I have, therefore, been unable to find any constitutional authority for the enactment of section 5519 of the Revised Statutes. The decisions of the supreme court above referred to leave no constitutional ground for the act to stand on.

As, therefore, there is no valid law by which the judgment of the district court in this case can be sustained, its judgment must be reversed and the cause remanded with directions to discharge the prisoner.

CONSTITUTIONAL LAW—THIRTEENTH AMENDMENT. Article 13 of the amendments to the constitution of the United States was not intended to afford relief to parties unlawfully deprived of their liberty; its purpose is satisfied when such restraint is rendered illegal.(a) The object of this amendment was to deprive both congress and the respective states of the power to reduce any person to the condition of slavery or involuntary servitude, except as a punishment for crime;(b) the term servitude having a larger significance than slavery.(c) The utmost effect of this amendment is to declare the colored as free as the white race, and to give them nothing more than freedom;(d) and is a positive prohibition of slavery.(e) That personal servitude was meant is shown by the use of the word "involuntary,"(f) which includes an indenture of apprenticeship in violation of state law.(g) The second section of this amendment authorizes congress to pass such laws as are appropriate, but not to annul state laws or control their operations;(h) and imports nothing more than to uphold the emancipating section and prevent a violation of the liberty of the enfranchised race,(i) and any legislation which practically tends to secure the full enjoyment of personal freedom is appropriate.(j) So, a law which only permits the same class of persons to testify against a black man in a matter where personal property is concerned, tends to enforce this amendment.(k) This amendment does not authorize congress to pass laws for the punishment of offences against persons of the colored race—that belongs to the state government.(l)

FOURTEENTH AMENDMENT. The main purpose of the fourteenth amendment was to establish the citizenship of the negro; to secure to the colored race the benefit of the freedom previously accorded to them.(a) It does not add anything to the rights of a citizen as against another, but only furnishes

(a) *People v. Brady*, 40 Cal. 198. See *In re Parrott*, 1 Fed. Rep. 481.

(b) *People v. Washington*, 28 Cal. 658.

(c) *Slaughter-house Cases*, 16 Wall. 69; *Matter of Turner*, 1 Abb. U. S. 84.

(d) *Bowlin v. Com.* 2 Bush. 5.

(e) *U. S. v. Cruikshank*, 92 U. S. 543; *S. C. 1 Woods*, 308.

(f) *Slaughter-house Cases*, 16 Wall. 69; *Matter of Turner*, 1 Abb. U. S. 84.

(g) *Matter of Turner*, 1 Abb. U. S. 84.

(h) *People v. Brady*, 40 Cal. 198.

(i) *Bowlin v. Com.* 2 Bush, 5.

(j) *People v. Washington*, 28 Cal. 658.

(k) *U. S. v. Rhodes*, 1 Abb. U. S. 34; *People v. Washington*, 28 Cal. 658.

(l) *U. S. v. Cruikshank*, 1 Woods, 308.

(a) *Slaughter-house Cases*, 16 Wall. 36; *Fraser v. State*, 3 Tex. Ct. App. 267.

a guaranty of protection against the acts of the state government;(b) but not a guaranty against the commission of individual offences;(c) and has reference to state action exclusively, and not to any act of private individuals.(d) It is an inhibition on the states denying to them the power to deprive citizens of the equal protection of the laws, and giving to congress the power to enforce the provision.(e) It applies to all the instrumentalities and agencies employed in the administration of its government, its executive, legislative, and judicial departments, and to the subordinate legislatures or divisions of its counties or cities.(f) By this amendment congress had the right to pass the civil-rights bill, which is constitutional;(g) but it can only legislate in protection of the rights of citizens of the United States, as such;(h) and it was not intended to transfer the protection of all civil rights to the federal government, nor to bring within the power of congress the entire domain of civil rights heretofore belonging exclusively to the several states.(i) Privileges and immunities as mentioned in this amendment includes such as are derived from or recognized by the constitution,(j) and are not identical with those referred to in section 2 of article 4 of the constitution;(k) nor does this amendment add to the privileges and immunities existing at the time of its adoption.(l) States may pass laws to regulate the privileges and immunities of its own citizens provided they do not abridge the privileges and immunities of citizens of the United States.(m) So they may pass laws for the protection of the lives, health, and property of their citizens,(n) as laws prohibiting miscegenation.(o) So the state may regulate the right to practice a profession, as of the law, or medicine,(p) or the right to sell intoxicating liquors,(q) or the right of fishery,(r) or the right to trial by jury;(s) or it may legislate as to the rules of evidence;(t) and may exclude Chinese from the right to testify where a white man is a party;(u) and for or against negroes, equally with whites, under the civil-rights bill;(v) so a state may impose a more severe punishment for adultery or fornication where the parties are of different races,(w) or

(b) *Virginia v. Rives*, 100 U. S. 313; *U. S. v. Cruikshank*, 11 Woods, 316; *S. C. 92 U. S. 543*; *Ward v. Flood*, 48 Cal. 36; *Van Valkenburg v. Brown*, 43 Cal. 43; but see *U. S. v. Hall*, 13 Int. R. R. 181.

(c) *U. S. v. Cruikshank*, 1 Woods, 316.

(d) *Virginia v. Rives*, 100 U. S. 313. See *Wells v. State*, 3 Lea, 70.

(e) *Strander v. West Virginia*, 100 U. S. 303.

(f) *Ah Kow v. Nunan*, 5 Sawy. 552.

(g) *Smith v. Moody*, 26 Ind. 307; *In re Turner*, 1 Abb. U. S. 88; *Chase*, 157.

(h) *Cully v. Balt., etc.*, R. Co. 1 Hughes, 536; *U. S. v. Cruikshank*, 92 U. S. 560; *S. C. 1 Woods*, 308.

(i) *Slaughter-house Cases*, 16 Wall. 36; *Frasher v. State*, 3 Tex. Ct. App. 267.

(j) *State v. McCann*, 21 Ohio St. 193.

(k) *Slaughter-house Cases*, 16 Wall. 71; *Live Stock, etc., Ass. v. Crescent City*, 1 Abb. U. S. 398; *U. S. v. Anthony*, 11 Blatchf. 204; See *Ex parte Hobbs*, 1 Woods, 542.

(l) *Miner v. Happersett*, 21 Wall. 162; *Ward v. Flood*, 48 Cal. 36; *Frasher v. State*, 3 Tex. Ct. App. 267.

(m) *Slaughter-house Cases*, 16 Wall. 36.

(n) *Slaughter-house Cases*, 16 Wall. 36; *Thorpe v. Rutland, etc.*, R. Co. 27 Vt. 149; *New York v. Miln*, 11 Pet. 102; *U. S. v. Cruikshank*, 92 U. S. 542; 1 Woods, 308.

(o) *Walker v. Sauvinet*, 92 U. S. 90. See *Frasher v. State*, 3 Tex. Ct. App. 262; *State v. Gibson*, 36 Ind. 389; *Ex parte Hobbs*, 1 Woods, 537; *Goss v. State*, 24 Alb. Law J. 118.

(p) *Bradwell v. State*, 16 Wall. 130; *U. S. v. Anthony*, 11 Blatchf. 201; *Mason v. Illinois*, 94 U. S. 113; *Ex parte Spinney*, 10 Nev. 323.

(q) *Bar emeyer v. Iowa*, 18 Wall. 129.

(r) *McCready v. Virginia*, 94 U. S. 391.

(s) *Walker v. Sauvinet*, 92 U. S. 90.

(t) *People v. Brady*, 40 Cal. 188; *Duffy v. Holson*, 40 Cal. 240. See *State v. Rashi*, 1 Houst. Cr. C. 271.

(u) *People v. Brady*, 40 Cal. 188; overruling *People v. Washington*, 36 Cal. 653.

(v) *People v. Washington*, 36 Cal. 653.

(w) *Ford v. State*, 53 Ala. 150; *Ellis v. State*, 42 Ala. 525; *Green v. State*, 58 Ala. 190.

may inflict a penalty on a white person for marrying a negro, (x) or it may provide for the education of colored children in schools distinct from schools for white children. (y) This amendment does not relate to territorial or municipal arrangements, or political subdivisions made for different portions of the state. (z)

FIFTEENTH AMENDMENT. This amendment invests citizens of the United States with a new right within the protecting power of congress. (a) It takes away the authority of the state to discriminate against citizens of the United States on account of race, color, or previous condition of servitude; (b) but the power of the state upon all other grounds, including that of sex, remains intact. (c) It does not confer the right of suffrage on any one; (d) but its adoption rendered inoperative a provision in the then-existing constitution of a state whereby the right of suffrage was limited to the white race. (e) By this amendment all persons born in the United States are citizens thereof and capable of becoming voters, but the provision is not self-executing. (f) The provisions of this amendment extend to a statute confining selections of jurors to persons possessing the qualifications of electors. (g) And the exclusion of a citizen of African descent from the grand jury and from the petit jury is a violation of their personal rights. (h)—[ED.]

(s) *Ex parte Francois*, 3 Woods, 367. See *Ex parte Kinney*, 3 Hughes, 9; *Ellis v. State*, 42 Ala. 525.

(y) *Ward v. Flood*, 48 Cal. 36; *Cory v. Carter*, 48 Ind. 327; *State v. McCann*, 21 Ohio St. 129; *U. S. v. Buntin*, 10 Fed. Rep. 730, and note, 736.

(z) *Missouri v. Lewis*, 101 U. S. 22.

(a) *U. S. v. Reese*, 92 U. S. 218; *U. S. v. Cruikshank*, 92 U. S. 542; 3 C. 1 Woods, 308.

(b) *U. S. v. Reese*, 92 U. S. 218; *U. S. v. Cruikshank*, 92 U. S. 542; 1 Woods, 308; *U. S. v. Petersburg Judges*, 14 Am. L. Reg. 105; *Van Valkenburg v. Brown*, 43 Cal. 43; *Wood v. Fitzgerald*, 3 Or. 568.

(c) *Van Valkenburg v. Brown*, 43 Cal. 43.

(d) *Miner v. Happersett*, 21 Wall. 178; *U. S. v. Cruikshank*, 92 U. S. 555; 1 Woods, 308; *U. S. v. Reese*, 92 U. S. 214; *Anthony v. Haldeman*, 7 Kan. 60; *Hedgman v. State*, 26 Mich. 61; *U. S. v. Petersburg Judges*, 14 Am. L. Reg. 105.

(e) *Neal v. Delaware*, 103 U. S. 370.

(f) *Spencer v. Board*, 1 McArthur, 169. See *Sealey v. Knox*, 2 Woods, 368.

(g) *Neal v. Delaware*, 103 U. S. 370.

(h) *Strander v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, Id. 315; *Ex parte Virginia*, Id. 339. But as to selection of jurors see *In re County Judges*, 3 Hughes, 576.

UNITED STATES *v.* CHILDERS.*(District Court, D. Oregon. June 27, 1882.)*

GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

By the act of July 2, 1864, (13 St. 365) the odd-numbered sections along the line of the Northern Pacific Railroad Company, for 40 miles on either side of the line in the territories and 20 miles in the states, is set apart and devoted to construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely when and as fast as any 25 miles of said road is constructed and accepted by the United States; and in the mean time the legal title to the unearned and unpatented sections is in the United States, who may, therefore, maintain legal proceedings against any one that unlawfully cuts timber thereon.

Information for Cutting Timber on Public Lands.

J. F. Watson, for plaintiff.

DEADY, D. J. The defendant is accused by the information herein of the crime of cutting timber on the public lands of the United States, within the jurisdiction of this court, with the intent to dispose of the same, contrary to the statute of the United States. The defendant pleads "not guilty," and submits the case to the court for judgment upon the following statement of facts, which it is agreed between himself and the district attorney shall stand and be considered as the special verdict of a jury, duly found and given in the case, upon a trial of the issue made by said plea, to-wit:

"That the defendant, in the year 1880, went upon the north-east $\frac{1}{4}$ of section 1, of township 2 north, range 8 east, of the Wallamet meridian, situate on the south bank of the Columbia river, near Shell Rock, about 12 miles above the Cascades, in the county of Wasco, and state of Oregon, under a contract with the Northern Pacific Railroad Company to purchase the same of it in five years thereafter, with a permit therein to cut timber thereon for the improvement of the premises; that the defendant built a house thereon and constructed a flume upon which to float wood to the river, and afterwards sold his improvements upon the premises to a third person for \$1,000, and abandoned them; that during his occupancy of the premises he cut about 600 trees from about 10 acres of the same, from which he made about 1,200 cords of firewood, that he boated to the Dalles, a distance of about 28 miles, and sold it for \$4,800; that said timber was worth while uncut about 50 cents a tree, or 25 cents a cord; and that the premises are within the limits of the grant to the Northern Pacific Railroad Company, as provided in sections 3 and 4 of the act of July 2, 1864, (13 St. 365), granting lands to aid in the construction of said railway, but being as yet 'unearned' and unpatented because 'not opposite to and coterminous with' any 'complete section' or portion of the road of said corporation."

By section 3 of said act of July 2, 1864, it is provided "that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction" of its road and telegraph line to the Pacific coast, the odd-numbered sections of the public lands of the United States for 40 miles on each side of the line of said road, through the territories, and 20 miles through the states, not otherwise appropriated "at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office;" and by section 4 it is further provided "that whenever said Northern Pacific Railroad Company shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated" by the act, and that fact shall be made to appear to the president by report of commissioners, as therein provided, "patents of lands aforesaid shall be issued to said company confirming to the said company the right and title to said lands situate opposite to and coterminous with said completed section of said road; and from time to time, whenever 25 additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every 25 miles of said road is completed, as aforesaid:" provided, that only 10 sections of land per mile "shall be conveyed to said company" on the line of the road east of the western boundary of Minnesota until the whole of said road east of said boundary is finished.

Section 6 of the act provides that the president shall cause the lands to be surveyed for 40 miles in width on both sides of said road, "after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

Upon this state of law and fact, the question is, did the act of July 2, 1864, *supra*, vest in or pass the title to the odd sections along the line of the road to the Northern Pacific Railroad Company as soon as said line was definitely fixed, and the plat thereof filed in the general land-office, or does it remain in the United States until it is earned by the company by the construction of the road opposite thereto and the issue of the patent therefor?

The case of *Schulenberg v. Harriman*, 21 Wall. 44, is a leading

case on this subject. There the act under consideration—June 3, 1856, 11 Stat. 20—was held to be a present grant to the state of Wisconsin, and that the legal title thereby passed to the state. But besides the words of grant similar to those in section 3 of the Northern Pacific Railroad act, "that there be and is hereby granted," the Wisconsin act also provided that the lands embraced therein should "be subject to the *disposal* of the legislature," and that in case the road they were given to aid in the construction of was not built in 10 years, the lands remaining unsold should *revert* to the United States; and no provision was made in the act for issuing patents to the lands, nor did it contain any clause which purported to or could be construed to restrain or limit the operation of the words of present grant.

The court held that the legal title to the lands passed to the state, and therefore it was the owner of logs cut thereon, and was entitled to the benefit of the usual remedies for their removal or conversion.

The doctrine of the case is succinctly stated by Mr. Justice Field, in his opinion, as follows:

"They [the authorities] establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts."

But in my judgment the clauses in section 4 of the act under consideration, concerning the *conveyance* of the lands granted to the corporation as each section of 25 miles of the road is constructed and accepted by the grantor, does restrain the operation of the words of present grant in section 3, so that it appears manifest that while it was the intention of congress to set apart and devote the lands in question absolutely to the construction of the Northern Pacific Railroad, yet it did not intend to part with the title to them until and only so fast as they were *earned* by the completion of the work.

This view of the question is further confirmed by the provisions contained in sections 8 and 9 of the act, the plain purport and effect of which is that if the company does not proceed with the work and complete the road as rapidly as therein provided, the United States may take the construction of the road into its own hands, and to that end may dispose of or appropriate the unearned and unpatented land in any way "needful and necessary to insure a speedy completion of the road."

Such a power is compatible and consonant with the idea that the lands were devoted by congress to the construction of the road, while

the legal title and control of them should remain in the United States until the lands were earned by the company in the construction of the same, but incompatible with the idea of an absolute grant to the corporation *in presenti* that would entitle it to dispose of, encumber, or squander the lands in advance of the construction of the road, and thereby prevent the United States from completing it by this means in the contingency contemplated.

In *Rice v. Ry. Co.* 1 Black, 358, it was held that an act giving lands to the territory of Minnesota to aid in the construction of a railway therein, by words of present grant, "there is hereby granted," did not pass the title to the territory, taken in connection with another provision in the act to the effect that no title should vest in the territory until 20 miles of the road were completed and accepted by the secretary of the interior, when a patent should issue for so much of the grant, and so on, as often as any 20 miles of the road were so completed and accepted. This ruling was approved in *Schulenberg v. Harriman, supra*, 62.

And although there is no express declaration in the North Pacific act that the title shall vest in the corporation until the completion of the road, or portions of it, yet the legal effect of the clauses therein, which provide for conveying and confirming the title to the company by patent only upon the completion of the road, or portions of it, is the same.

My conclusion, then, is that the legal title to the unearned portions of this grant—the odd-numbered sections opposite to which the road has not been completed and accepted—is still in the United States.

Subsequent to the grant and the adoption of the line of the road, and prior to its construction, the relation between the United States and the corporation is analagous to that of vendor and vendee—the latter being in possession under a contract to purchase and receive a conveyance upon the payment of the purchase money or the performance of the act constituting the consideration for the sale.

The premises upon which the defendant cut the timber in question being a part of these unearned lands, he is guilty of violating section 4 of the act of June 3, 1878, (20 St. 90,) which enacts that any person who shall unlawfully cut any timber growing on any land of the United States, in Oregon, with intent to export or dispose of the same, shall be guilty of a misdemeanor, and on conviction thereof fined not less than \$100 or more than \$1,000.

See *The Timber Cases*, 11 FED. REP. 81; *U. S. v. Smith*, Id. 487.

LARNED v. GRIFFIN.

(Circuit Court, D. Massachusetts. July 6, 1882.)

PRIVILEGE OF SUITORS AND WITNESSES.

Parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning; and this immunity extends to all kinds of civil process, and affords absolute protection.

COLT, D. J. In this case it appears that the defendant was arrested while in Boston, Massachusetts, in attendance before a commissioner acting under a commission issued out of the superior court for Cook county, Illinois, to take the depositions of certain witnesses in a case pending in that court between the same parties, and for the same cause of action as this suit. The defendant submitted to the arrest, and gave bail. The suit was first brought in the state court, and afterwards duly removed here. The only question now before the court is whether the plea in abatement, setting up the privilege of the defendant from arrest, can be sustained. To decide this we must determine—*First*, whether the defendant was privileged from arrest at the time; *second*, whether his remedy can be enforced by a plea in abatement; *third*, whether submitting to the arrest and giving a bail-bond is a waiver of the privilege; *fourth*, whether answering to the merits is a waiver of the plea in abatement.

It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning. *Thompson's Case*, 122 Mass. 428; *In re Healey*, 53 Vt. 694; S. C. Reporter, April 5, 1882; *Huddeson v. Prizer*, 9 Phila. 65; *Ex parte Hurst*, 1 Wash. 186; *Ju-neau Bank v. McSpedan*, 5 Biss. 64; *Bridges v. Sheldon*, 7 FED. REP. 17, 43; *Person v. Grier*, 66 N. Y. 124; Bacon, Abr. "Privilege, B," 2; *Meekins v. Smith*, 1 H. Bl. 636; 1 Greenl. Ev. § 316.

And this protection extends to the attendance of parties and witnesses before arbitrators, commissioners, and examiners. *Spence v. Stewart*, 3 East. 89; *Arding v. Flower*, 8 Term Rep. 534; *Sanford v. Chase*, 3 Cow. 381; *U. S. v. Edine*, 9 S. & R. 147; *Huddeson v. Prizer*, 9 Phila. 65; *Wetherill v. Seitzinger*, 1 Miles, 237; *Bridges v. Sheldon*, 7 FED. REP. 17, 43; 1 Greenl. Ev. § 317.

It is clear, therefore, that the defendant was privileged from arrest at the time it was made. But whether his remedy is by plea in

abatement is less free from doubt. Under the old English rule, this immunity was taken advantage of by writ of privilege.

"The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit. * * * But since the statute of 12 Wm. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it has been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion." 1 Bl. Comm. 166.

The more modern way in England has been to raise the question either by motion or by plea in abatement. *Pitt's Case*, 2 Stra. 985; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Meekins v. Smith*, 1 H. Bl. 636; *Randall v. Gurney*, 3 B. & Ald. 252; Com. Dig., "Abatement," D, 6; 1 Chit. Pl. 443; *Davis v. Rendlesham*, 7 Taunt. 679.

In this country the right of privilege has been brought before the court in three ways. By motion: *Ex parte Hurst*, 1 Wash. 186; *Lyell v. Goodwin*, 4 McLean, 29, 41; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Sanford v. Chase*, 3 Cow. 381; *Seaver v. Robinson*, 3 Duer, 622; *Harris v. Grantham*, Coxe, (N. J.) 142; *Starrett's Case*, 1 Dall. 356; *Hammerskold v. Rose*, 7 Jones, (Law,) 629; *Hunter v. Cleveland*, 1 Brev. 168; *Henegar v. Spangler*, 29 Ga. 217. By *habeas corpus*: *Ex parte McNeil*, 6 Mass. 264; *Wood v. Neale*, 5 Gray, 538; *May v. Shumway*, 16 Gray, 86; *Richards v. Goodson*, 2 Va. Cas. 381. By plea in abatement: *King v. Coit*, 4 Day, 130; *Case v. Rorabacher*, 15 Mich. 537; *Julio v. Bolles*, 22 Law. Rep. 354; *Gilbert v. Vanderpool*, 15 Johns. 242; *Anderson v. Rountree*, 1 Pin. (Wis.) 115; *Chaffee v. Jones*, 19 Pick. 261, 265; *Hoppin v. Jenckes*, 8 R. I. 453.

It is contended by the plaintiff that the common-law privilege of suitors and witnesses never extended so far as to abate the suit, however different the rule may be in case of members of parliament, ambassadors, and attorneys.

Anciently, it would seem, in all cases of privilege, the *supersedeas* which was granted upon a writ of privilege only operated to deliver the party out of custody, and he was still held upon common bail. *Long's Case*, 2 Mod. 181; *Pitt's Case*, 2 Stra. 987; 1 Bl. Comm. 166.

But after the statute of 12 Wm. III. c. 3, it was decided in *Pitt's Case*, 2 Stra. 987, that members of parliament, or those entitled to privilege of parliament, should be discharged absolutely, and not upon common bail. See, also, *Cassidy v. Steuart*, 4 Scott, N. R. 432; 40 Eng. Com. Law, 450.

The rule, however, with respect to suitors and witnesses was still maintained that while the arrest would be set aside, common bail must be filed,—the suit did not abate. *Cameron v. Lightfoot*, 2 W. Bl. 1190.

The early decisions in this country are not harmonious. In some of the older cases the rule was followed that the privilege of suitors and witnesses extends no further than exemption from arrest; that service by summons is legal; and that in cases of arrest common bail must be filed, or a general appearance entered. *Blight v. Fisher*, Pet. C. C. 41; *Hunter v. Cleveland*, 1 Brev. 16; *Taft v. Hoppin*, Anthon, N. P. 255; *Booraem v. Wheeler*, 12 Vt. 311; and the more recent case of *Bishop v. Vose*, 27 Conn. 1.

In other cases, however, we find the right extended, and a more complete protection afforded suitors and witnesses, the discharge from arrest being absolute, and service by summons held illegal. *Hayes v. Shields*, 2 Yeates, 222; *Miles v. McCullough*, 1 Binn. 76; *U. S. v. Edme*, 9 S. & R. 147; *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Harris v. Grantham*, Coxe, (N. J.) 142.

Whatever may have been the earlier view, we have no doubt that the tendency in this country has been to enlarge the right of privilege so as to afford full protection to suitors and witnesses from all forms of process of a civil character during their attendance before any judicial tribunal, and for a reasonable time in going and returning. Let us pursue the subject a little further. The case of *Blight v. Fisher*, Pet. C. C. 41, decided in 1809 by Justice Washington, holding that a service of summons upon a witness is good, is distinctly overruled in the later case of *Parker v. Hotchkiss*, 1 Wall. Jr. 269, the court stating that the opinion met with the approval of Chief Justice Taney and Justice Grier. See, also, the elaborate opinion in *Lyell v. Goodwin*, 4 McLean, 29, to the effect that a judge about to start on his circuit is not liable to be served with summons, his privilege being as extensive as that of a suitor or witness or juror of the court. The same view is expressed in *Juneau Bank v. McSpedan*, 5 Biss. 64; *Bridges v. Sheldon*, 7 FED. REP. 17, 43.

In the earlier cases in New York, a distinction was taken between resident and non-resident suitors and witnesses. In the case of non-residents an absolute discharge was granted. *Norris v. Beach*, 2 Johns. 294. But in the case of residents common bail had to be given. *Bours v. Tuckerman*, 7 Johns. 538.

Referring to these two decisions in *Sanford v. Chase*, 3 Cow. 381, the court observed: "We adopt the first case; the privilege of a wit-

ness should be absolute." In the recent case of *Person v. Grier*, 66 N. Y. 124, the court declare that any distinction between residents and non-residents is doubtful, and the broad ground is taken that this immunity is one of the necessities of the administration of justice, and that courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. *Seaver v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How. Pr. 331.

The case of *Taft v. Hoppin*, (1816,) Anthon, N. P. 255, which decided that the defendant, a non-resident suitor, should be held upon common bail, was rendered at *nisi prius*, and in view of the prior case of *Norris v. Beach*, 2 Johns. 294, and of the subsequent decisions in the highest court of the state, it can hardly be deemed authority.

In Pennsylvania, from an early period, complete immunity seems to have been extended to suitors and witnesses. *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates, 222; *U. S. v. Edme*, 9 S. & R. 147; *Holmes v. Nelson*, 1 Phila. 217.

"It is alike the privilege of the person and the privilege of the court. It renders the administration of justice free and untrammelled, and protects from improper interference all who are concerned in it," say the court in *Huddeson v. Prizer*, 9 Phila. 65.

In New Jersey, also, a full discharge is granted. *Harris v. Grantham*, Coxe, (N. J.) 142.

In Massachusetts it was held by Judge Morton in *Julio v. Bolles*, 22 Law Rep. 354, that a foreign witness was protected from summons. In that case a plea in abatement had been filed, which was demurred to by the plaintiff. In overruling the demurrer the learned judge observes: "If this service was illegal, the jurisdiction fails and the writ should be abated."

In Vermont, we are referred by plaintiff's counsel to the case of *Booraem v. Wheeler*, 12 Vt. 311, which holds a plea in abatement bad in the case of a witness arrested while attending court; the court maintaining that it has never been held that a man's property may not be attached, or he be served with a summons, while attending court as a witness or suitor. What is wanted is that the suitor or witness may give uninterrupted attendance at court; that this object is not secured by abating the writ, for the question may not be heard until long after the court he was attending had closed its session. The legal object can be and always has been better secured by the summary proceeding of a motion to the court to release the person for the time being, or by *habeas corpus*.

But the views here expressed of the extent of the privilege of suitors or witnesses are clearly inconsistent with the latter case in Vermont of *In re Healey*, (1881,) 53 Vt. 694, which declares a service by summons upon a witness to be illegal. The court, citing *Person v. Grier*, 66 N. Y. 124, and other cases, remark: "In the case of a non-resident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional." And it is further declared that if the writ had been made returnable to that court it would have been dismissed upon motion; the court would not have taken *jurisdiction* of a party whose rights were thus invaded, for to do so would be in effect a withdrawal of the shield and protection which the law uniformly gives to witnesses.

Whether this plea in abatement shall be sustained or not, turns upon the view taken of the extent and character of the privilege to which suitors and witnesses are entitled. If we adopt the older and narrower view, that this is wholly the privilege of the court rather than of the suitor, and therefore a question of judicial discretion rather than of personal right; and further, that while the offender may be punishable for contempt if the arrest is made in the actual or constructive presence of the court,—still the suitor or witness can only ask to have the arrest set aside upon giving common bail, or entering a general appearance; then the suit does not abate, and the present plea is bad. But if we adopt the broader rule, which it appears to us is clearly warranted by the more recent decisions in the federal and state courts, and which in our opinion is necessary to the due administration of justice, that this immunity extends to all kinds of civil process, and affords an absolute protection, then we see no good reason why a plea in abatement is not proper here, as in other cases of privilege where an absolute discharge is granted, and where the plea is held good. See authorities before cited.

The plaintiff contends that the defendant submitted to the arrest, made application to give bail, and entered into a bond, and that this constitutes a waiver of his privilege. We do not think this sound, though we are aware that some cases seem to point in this direction: *Fletcher v. Baxter*, 2 Aiken, (Vt.) 224; *Brown v. Getchell*, 11 Mass. 11, 14.

The question, however, was directly passed upon in *U. S. v. Edme*, 9 S. & R. 147, 149, and it was there decided that the giving of a bail-bond is so far from waiving the privilege, that the court, when they discharge, will order it to be delivered up and cancelled.

"It is not esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest." *Redfield, J.*, in *Washburn v. Phelps*, 24 Vt. 506.

It appears in this case that an answer to the merits was filed with the plea in abatement. It has been decided that in Massachusetts the validity of neither is affected by their being pleaded together, and that the plea in abatement is not thereby waived. *Fisher v. Fraprie*, 125 Mass. 472; *O'Loughlin v. Bird*, 128 Mass. 600.

Upon the whole we are of the opinion that the plea in abatement should be sustained.

Action dismissed.

See *Atchison v. Morris*, 11 FED. REP. 582; *Plimpton v. Winslow*, 9 FED. REP. 365; *Matthews v. Puffer*, 10 FED. REP. 606, and note.

LEHMAN, DURR & Co. v. CENTRAL RAILROAD & BANKING Co.

(Circuit Court, M. D. Alabama. 1882.)

COMMON CARRIER—ALTERED BILL OF LADING—LIABILITY.

The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, will not render the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading.

Action for Damages. Demurrer to complaint.

WOODS, Justice. The gravamen of the complaint is that the defendant so negligently performed its duty in respect to the making out of the bills of lading that it was in the power of any one to commit the fraud alleged. The question is, does the fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, render the common carrier liable for any loss occasioned by the forgery of the shipper in raising the bill of lading? We think that upon the weight of reason and authority the question must be answered in the negative.

The cases most nearly resembling this are those in which a promissory note has been executed complete upon its face, in which there are blanks left by the maker, in which, after the delivery of the note, additional words, without the assent of the maker in the draw-

ing, had been inserted, increasing the amount of the note, or the rate of interest, etc. Such notes have been held to be void in the hands of a *bona fide* holder.

The rule established by the authorities seems to be that where a note complete on its face and not entrusted by the maker to any one for the purpose of being filled up or added to, but which is afterwards altered without the authority or assent of the maker, by the insertion of additional words in blank spaces therein, the maker cannot be held to have contracted with every subsequent innocent holder who may thereby be defrauded, and is not liable to him in an action on the note in its altered form. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, and cases therein cited.

In *Wade v. Withington*, 1 Allen, 561, the defence that a note for \$100 had been fraudulently altered after it had been signed, by inserting the words "and forty," was sustained against a *bona fide* indorser, although the alteration could not be detected on the most careful scrutiny.

So in *McGrath v. Clark*, 56 N. Y. 34, when a blank left in a note was filled with the words "with interest" after it had been signed by the maker, and indorsed by the payer, and the words were inserted without the assent of the indorser, it was held that the note was void as to the latter. Chief Justice Church, in delivering the opinion of court, said: "The rule that when one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, is not applicable, for the reason that the indorser did not in any legal sense enable the maker to make the alteration. He indorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to change or alter it. If it did, indorsers would occupy a perilous position."

In the case of *Worrall v. Gheen*, 39 Pa. St. 388, a printed form of a promissory note had been filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. Upon this case the court said: "If the same had been left entirely blank the impression would have been that the parties authorized the holder to act as their agent in filling it in, and they would have been bound accordingly. But when the sum is actually written, we can make no such inference from this fact that there is room to write more. This fact shows carelessness, but it was not the carelessness of the indorser but the forgery of the maker that was the proximate cause that misled the holder."

In *Holmes v. Trumper*, 22 Mich. 427, it was held that a promissory note which consisted of a printed blank, with the amount and time and place of payment filled in writing, and was altered, without the knowledge and consent of the maker, by adding after the printed words "with interest at," at the end of the note, the words "ten per cent.," were thereby rendered void even against an indorser who bought it in good faith. The court said: "The argument for the plaintiff amounts simply to this: that by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word "at" and to draw a line through the blank which followed it, and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way." But the court held the argument not to be sound, and declared that "whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should be equally protected from its alteration by forgery, in whatever mode it may be accomplished, unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence, as acting for him. He has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been."

To the same effect is the case of *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264, [S. C. 1 N. W. Rep. (N. S.) 491,] in which it was held that where a negotiable note for ten dollars was executed with a blank preceding the amount, and afterwards the words "one hundred and" were fraudulently inserted before the word "ten," and there was nothing in the note to excite suspicion, and it was subsequently transferred to the innocent holder, the latter could not recover on the note.

In the case of *Wood v. Steele*, 6 Wall. 80, the suit was upon a promissory note, which after its delivery had, without the assent of the maker, been altered by altering the date of its maturity. The court held that the alteration extinguished the liability of the maker, and remarked: "The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he had as little reason to anticipate the one as the other. The law regards the security, after it is altered, as an entire forgery, with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly."

These citations show the drift of American authority on the question, and they are not opposed by any English decision.

In the case of *Young v. Grote*, 4 Bing. 253, S. C. 12 Moore, 484, the drawer had left with his wife checks signed by himself in blank, and the fraudulent alterations were made by his clerk, who was directed by his wife to fill out the check, and it having been found by an arbitrator that the maker had been guilty of gross negligence by causing his check to be delivered to his clerk in such a state that the latter could, and did by the mere insertion of additional words, make it appear to be his check for a larger sum, it was held by the court that he could not recover that sum from his banker, who had paid it. The ground upon which this decision rests is that the check was drawn in so negligent a way as to facilitate the forgery, and to exonerate the banker from liability to his customer from paying the amount that the latter, as it seems, gave authority to the party to fill up the check in the way it was filled up. See *Roberts v. Tucker*, 20 L. J. (N. S.) Q. B. 270; 16 Q. B. 560.

But this case is clearly distinguishable from the case of promissory notes above cited.

(1) The relation of the maker of a promissory note and the indorser is entirely different from that held by a customer to his banker. The contract of the banker with his customer is to honor the latter's checks, and if the negligence of the customer affords opportunity to the clerk or other person in his employ to add to the terms of a check, and thereby mislead the banker, the customer is held liable to the banker.

(2) There was no alteration of the check after it left the hands of the drawer's agents. The alteration was made by the banker's own agents, to whom he had entrusted his blank checks.

We may, then, take it as settled that when the maker of a note uses a printed blank, and fills in the amount for which he intends to become liable, leaving a vacant space to the left of the amount, in which, after the note has been put in circulation, words are fraudulently inserted, which increases the amount of the note, the liability of the maker upon the note is extinguished, and no recovery can be had therein against him.

(3) This rule should apply with greater force to bills of lading, which are not negotiable commercial paper in the sense of bills of exchange or promissory notes.

The conclusion is therefore inevitable that no suit could have been maintained by the plaintiffs, the consignees, on the bills of lading

mentioned in the complaint. If that be true, is there any ground for holding the defendant liable for its alleged negligence in filling up the bill of lading? Because, by the negligence charged, Johnson could the more easily commit the crime of forgery, is the defendant to be held civilly liable for the consequence of that crime? If a grantor leaves a blank in a deed, of which the grantee takes advantage by inserting words, which increases the amount of land which the deed purports to convey, and thereby cheats and defrauds a subsequent grantee, is the first grantor liable for the damages sustained by the last grantee? To ask the question is to answer it. No one is bound to presume that the parties with whom he deals are ready to commit crime, or is bound to take precautions to prevent it. "Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief?" *Bramwell, L. J., in Bazendale v. Bennett, note to Knoxville Bank v. Clarke, 33 Am. Rep. 137.* In writing promissory notes and bills of lading and other contracts which are to pass into the hands of others, every one has a right to presume that the criminal laws of the land will protect the paper from felonious alteration, and if crime is not thus restrained he cannot be held civilly liable for the resulting damages. A failure to take all precautions to prevent the felonious alteration of a contract in writing, is not negligence. The maker of the paper has the right to presume that no such alteration will be made.

I am therefore of opinion that the leaving of a blank space in the bill of lading filled up by Johnson, does not make defendant liable for the damages resulting from Johnson's forgery.

Here is another ground on which we think the demurrer ought to be sustained. Before the making of the bills of lading there were business relations between the plaintiffs and Johnson. The complaint shows that the plaintiffs had given him a letter of credit, the plain purpose of which was to enable him to buy cotton to be consigned to the plaintiffs, and the fair presumption is that the object of the arrangement was gain to both parties.

Pursuant to their understanding Johnson buys cotton, and expecting to draw a bill on the plaintiff for the purpose of paying for it, or other cotton to be shipped to them, he delivers the cotton to defendant, and takes a bill of lading for it, by the terms of which it is to be delivered to the plaintiff, as consignees. He thereby transfers the title of the cotton to the plaintiffs. Now, if not the agent of the plaintiffs in this transaction, he is their business associate and customer. To hold the railroad company responsible to the plaintiffs for the damages

resulting from a crime committed by their own customer in conducting the enterprise in which both were interested, because the company fail to suspect that the customer would commit a felony, and did not take precautions to prevent it, is to push the liability of a common carrier beyond that authorized by any adjudicated case, or by reason or justice. The plaintiffs trusted to Johnson to send them fair and honest bills of lading. It was they who confided in him. If he has defrauded them, they must look to him, and cannot shift the responsibility upon another party, which has been guilty of neither crime nor fraud, nor of any such negligence as can be considered the cause of their loss.

Lastly: The damage sustained by plaintiffs must be attributed to the proximate and not to the remote cause. Their loss was the direct result of the forgery committed by Johnson. Even on the theory of the plaintiffs, the negligence of the defendants preceded the forgery by Johnson and afforded the facilities for committing it. The plaintiffs cannot, therefore, charge their loss to the negligence of the defendant, which is the remote, and pass over the forgery of Johnson, which is its proximate cause. *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 254; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. (L. R.) 1; *Byles, J., in Richardson v. Dunn*, 8 C. B. (N. S.) 665; *Denny v. N. Y. Cent. R. Co.* 13 Gray, 481; *Morrison v. Davis*, 20 Pa. 171; *Railroad Co. v. Reeves*, 10 Wall. 176.

We are of opinion, therefore, that the facts stated in the complaint do not constitute a cause of action in favor of the plaintiff against the defendant. The demurrer must therefore be sustained.

MILLER v. UNION PACIFIC RY.

(Circuit Court, D. Colorado. June, 1882.)

1. NEGLIGENCE—CONTRIBUTORY—MASTER AND SERVANT.

If a master or another servant, standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him.

2. SAME—A QUESTION OF FACT.

If the circumstances be such that men of ordinary intelligence may honestly differ as to the question of negligence, it must be left to the jury.

On Demurrer.

L. S. Dixon and G. H. Gray, for plaintiff.

Willard Teller, for defendant.

MCCRARY, C. J. The complaint avers, among other things, the following facts:

First. That the defendant contracted with plaintiff for his services as a carpenter to work at his trade for defendant, and that by the terms of the contract plaintiff was to report to and work under the orders and instructions of a foreman employed by the company to superintend and oversee the carpenter work of said company at a certain coal mine, situated on a branch line of defendant's railroad in Elbert county, Colorado.

Second. That plaintiff was directed to and did proceed to said coal mine, and there reported to one Miles McGrath, the foreman of said company, there engaged in the superintendence and oversight of the carpenter work of said company at said coal mine, and who was also, in like manner, a foreman of said company to superintend, oversee, and perform work for the company, with carpenters under him, at other places, as he might be from time to time directed by the company.

Third. That by said contract plaintiff was to continue in the service or employment of said company until he should voluntarily withdraw from the same, or until he should be discharged from the same by order or direction of the said foreman, Miles McGrath.

Fourth. That plaintiff entered upon service in pursuance of the contract, and commenced work under the orders of said McGrath, and so continued until January 19, 1880, when he was injured as in the complaint stated.

Fifth. That the company had, upon its said branch line, a certain four-wheeled platform car, commonly denominated a "push-car," which was wholly unprovided with any machinery or other mechanical means of propulsion or movement, and was designed to be and was moved and propelled along the track by the hands of laborers or men walking behind and pushing the same, except at those places where by the downward grade or descent of the track the same would be moved and carried along by the law of gravitation.

Sixth. The said car was provided with no brakes or other means of checking its speed when in motion.

Seventh. That said car had been and then was in frequent and common use by said company, in the departments of repair and construction of said company, upon said branch road and upon a certain section of the main line, and was furnished by said company to be so used, in the movement and transportation of tools and materials, and, as occasion might serve or require, of laborers and workmen upon and along said branch road and a portion of said main line.

Eighth. That on two occasions plaintiff had ridden upon said car, the same being propelled by hand from the station to said coal mine.

Ninth. That, as plaintiff has since been informed and believes, push-cars designed and furnished to be used as above described, when they are to be used upon steep grades, are usually furnished with brakes, and that the grade upon the branch aforesaid was steep and heavy.

Tenth. That on the nineteenth of January, 1880, the foreman above named received a telegraphic order from the defendant company to take the carpenters so at work under him, being three in number besides plaintiff, and proceed with them, by the next eastern-bound train over said company's main line, to a station called Cheyenne Wells, distant about 100 miles, there to perform certain carpenter work for the company.

Eleventh. That thereupon said foreman caused the said push-car to be taken to the coal mine, and being there present in a position of authority, ordered the plaintiff and the other carpenters in great haste to pick up and pack their tools, bedding, blankets, etc., and put the same on the push-car, for transportation, and also ordered the plaintiff and two of his companions to get upon said car, which order they obeyed, and thereupon the foreman himself got upon said car and started it down the grade, with a view to reaching the station in time for the east-bound train. The car being heavily loaded, and having no appliances to control its velocity, soon acquired a great and dangerous rate of speed, and was approaching the station, where, by collision with other objects on the track, there was great danger to the persons on board. To avoid this greater danger the plaintiff jumped from the car and was injured.

Twelfth. That plaintiff was not familiar with the manner of using and operating push-cars, and fully believed it was safe for him to obey the order of the foreman and get upon said car.

The contention of the counsel for the defendant is that the complaint shows upon its face that plaintiff was guilty of contributory negligence. That the act of going upon the push-car, loaded as it was, and proceeding down a steep grade without the means of retarding or stopping its movement, was an act of negligence, is clear. *Miller v. Union P. R. Co.* 4 FED. REP. 768. This is not denied, but the plaintiff insists that the allegations of the present complaint, taken to be true, show that the negligence which caused the injury was wholly the negligence of the defendant company. In determining this question we are to assume for the present that the company furnished the push-car to be used, among other things, for the purpose of transporting workmen to and from their work; that it had been used for that purpose; that the foreman, McGrath, had authority to order and direct the plaintiff to go upon it, which order he was bound to obey, upon peril of dismissal from the service; and that plaintiff was unfamiliar with the operation of such car, and ignorant of the fact that the car was without brakes or other means of controlling its movement. Under such circumstances can it be said, as a matter of law, that he was guilty of negligence in obeying the foreman's order to go upon the car? We think not. The true rule is, that if a master or another servant, standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the

law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. 2 Thompson, Negligence, 974-6.

There may be cases in which a court can say, as matter of law, that a servant receiving an order from his master, or from a superior, is guilty of negligence in obeying it, but the present is not such a case. The law will rarely declare the act of obedience negligence *per se*. If the circumstances be such that men of ordinary intelligence may honestly differ as to the question of negligence, it must be left to the jury. *Lalor v. Railroad Co.* 52 Ill. 401; *O'Neil v. Railroad Co.* 9 FED. REP. 337.

The demurrer to the complaint must be overruled, and it is accordingly so ordered.

See *Hough v. Texas & Pac. R. Co.* 11 FED. REP. 621, note.

SELVAGE v. JOHN HANCOCK MUT. LIFE INS. CO.

(Circuit Court, E. D. New York. June 17, 1882.)

LIFE INSURANCE—TENDER OF PREMIUM—FORFEITURE FOR NON-PAYMENT.

In an action on a policy of life insurance to recover the amount of the policy on the death of the insured, the company cannot set up in defence a forfeiture of the policy by failure to pay or tender the premium on a particular day named in the policy, where the policy-holder was misled as to the day of payment and tender by information derived from the duly-authorized agents of the company, whereby tender was not made till after such date.

Estes & Barnard, for plaintiff.

Blatchford Seward and Griswold & Decosta, for defendant.

WHEELER, D. J. This is an action upon a policy of life insurance, and has now, after verdict for the plaintiff and before judgment thereon, been heard upon a motion of the defendant for a new trial. The policy provided for the payment of a premium at the office of the company, "or to their agents producing the receipt of said company," on or before the thirteenth day of July in every year during the continuance of the policy; that if any premiums should not be paid on or before the day when due, the policy should thereupon become forfeited and void, except as provided by the non-forfeiture law of Massachusetts; and that no person except the president or secre-

tary was authorized to make, alter, or discharge contracts or waive forfeitures. The premiums were paid to and received by agents producing receipts—for 1871 on July 17th; for 1872 on July 13th; for 1873 on August 1st; for 1874 on September 25th. The assured died March 13, 1879. The premium for 1875 was not paid on or before July 13th, and has never been received. If the plaintiff is entitled to have that premium treated as paid or tendered in due time, the non-forfeiture laws of Massachusetts would continue the policy so as to cover the death, otherwise not. The plaintiff's evidence tended to show that some time before July 13th, in that year, the assured and the plaintiff, being about to leave home, arranged with Edson C. Chick, a friend, to see to this payment for them; that afterwards, but still some time before the day, Chick called upon the agents who had charge of the defendant's business for that state, and who had produced the prior receipts and received the payments, and who had the receipt for that premium, and inquired when the premium would be due, being ignorant of the precise day and having no means at hand to ascertain it; that the agent said that their safe was locked and another agent was gone out with the key, so that the information could not then be given; that he then took Chick's address, and told him, further, that he would inform him seasonably of the day; that he never did inform Chick or the assured or the plaintiff of the day; that on the eighteenth day of August the assured took the requisite amount of money and started for the office of the agents, saying he would go there and tender the amount of the premium and returned saying he had done so; that controversy soon arose about non-acceptance of the premium, which was renewed after the death, in which the agents and officers of the defendant were fully informed that a tender on that day was claimed to have been made, and did not deny or dispute it. The defendant's evidence tended to show that notice was directed to be sent to the assured 30 days before the day; that no arrangement was made with Chick about informing him of the day; and that no tender of that premium was made. The defendant requested that a verdict be directed in its favor. The jury was instructed that if the assured and the plaintiff arranged with and relied upon Chick to see to the payment of that premium, and Chick applied at the office of the agents before the day for information as to the day, and the agent agreed to furnish it and did not, and Chick waited until after the day, relying upon that agreement, so that in fact Chick and the assured and the plaintiff were deceived into letting the day pass without payment by the agreement of the agent to inform Chick and

the failure to do so, and the premium was in fact tendered within a reasonable time of waiting for the information, the plaintiff was entitled to a verdict; but that if they were not so deceived into letting the day pass without payment, or if the tender of the premium was not in fact made, or if it was not made within a reasonable time for waiting for the information, the verdict should be for the defendant. The motion is urged principally on the ground that there was not sufficient evidence that a tender was actually made to be submitted to the jury upon that point, and because a verdict for the defendant was not directed.

What the assured said that he was going to do or had done about making the tender would not probably be sufficient to support the finding. What he said in starting with the money might be admissible as part of the *res gestæ*; what he said in returning was a mere narrative of a past transaction, hearsay, and of no weight. There is no question, however, as to the admissibility of this evidence under consideration; the question is whether all that was put in was sufficient. The conduct of a party with reference to a claim made about which the party is called upon to act is always admissible in evidence and important; and when a claim was made founded upon a fact, entirely, the existence of which was within the knowledge or reach of the knowledge of the party and not controverted, but proceeded about as if it existed, all this was not only competent but quite strong evidence in the nature of an implied admission that the fact existed.

It is doubtless true, as has been well argued for the defendant; that in case of such policies payment of the premiums must with great strictness be made at the day, and that misfortune or accident, or indulgence at some times after the day, will not excuse from payment, or entitle delinquents to indulgence at other times. *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24; *Kline v. N. Y. Life Ins. Co.* 3 Morr. Trans. 110; *Thompson v. Life Ins. Co.* Id. 332.

It is also true that these agents were somewhat special agents, with limited authority in respect to making new contracts and waiving forfeitures in respect to the policy, and that notice of the limitation was carried to policy-holders by the policy itself. Still, the requirement of payment was not so absolutely strict but that the conduct of the defendant could change or modify it. *Ins. Co. v. Eggleston*, 96 U. S. 572. Neither was the limitation upon the authority of the agents imposed by any statute or law, or otherwise, so that full authority might not be given by those entitled to confer authority, nor so but that it might be proved by course of dealing, or otherwise,

as such authority is usually proved. These agents were well authorized to receive payment according to the terms of the policy itself, and to transact the whole of that business in behalf of the defendant. Had they taken counterfeit money and called it good, probably no one would say that the policy was forfeited, although that would be non-payment, if good money was offered when the character of the bad was discovered and made known. Nor if they said that only part was due, and only what they said was due was offered, would any one probably say that the policy was forfeited because the whole was not offered? They were authorized to give all necessary information for the transaction of the business, and the defendant would be bound to the correctness of such as they should give. As has been said on behalf of the defendant, the assured could look at the policy for information as to the day, and Chick could have inquired of him; but Chick had not the information at hand, and although he had other sources to go to for it, and although they might not be bound to give it, still he had the right to ask for it of them, and if they gave it they were bound to give it correctly, and if they undertook to give it they ought to do so. They were not asked to waive a forfeiture, for there was none; nor were they asked to make, alter, or discharge any contract; they were merely asked for information and undertook to give it, but did not, and misled those interested in keeping up the insurance. This was done in a matter entrusted to them, and the defendant, which entrusted them, ought to bear the consequences. Had the assured called the thirteenth of July and inquired, and they had told him that the next day was the day, and relying upon that they had waited until the next day, and then been told it was too late, probably no one would say that the defendant was not estopped from claiming it was too late. That would be the same as this, except this was misleading for a longer time; but, as the jury have found, not longer than was reasonable to be relied upon.

The motion is denied, and the stay of proceedings is vacated.

RANSOM and another, as Ex'rs, v. GEER.

(Circuit Court, S. D. New York. June 27, 1882.)

1. EXECUTORS AS CO-REPRESENTATIVES—REMEDY BETWEEN.

Owing to the community of interest no action lies at law by one executor or administrator against his co-representative, but the remedy is in equity. So, where complainants, as executors, seek to recover a deficiency arising upon the sale of mortgaged premises sold for satisfaction of a mortgage made by defendant, a co-executor and one of the obligees in the bond, and mortgagee in the mortgage executed by himself; they are properly in a court of equity, and having in their hands the funds out of which defendant's commissions are payable for his services as executor, they can retain the sum due as his share, and apply it to reduce his indebtedness to the estate.

2. BANKRUPTCY—COMPOSITION—RIGHTS OF CREDITORS.

A composition proceeding not carried out, nor performance of the resolution tendered by the insolvent, is an accord without a satisfaction; it is not a discharge of the debt, and will not prevent a creditor from pursuing his action to recover his debt.

Butten, Stillman & Hubbard, for complainants.

Bristow, Peet, Burnett & Opdyke, for defendant.

WALLACE, C. J. The complainants' bill is filed upon the theory that they are entitled to invoke the jurisdiction of equity to set off the cross demands between themselves and the defendant.

The complainants and defendant were co-executors and trustees under the will of Jonathan D. Ransom, deceased, and upon several occasions the defendants borrowed a portion of the trust funds and executed and delivered his three several bonds and mortgages therefor. The defendant was named as one of the obligees in the bond, and as one of the mortgagees in the mortgages executed by him. He failed to make payment, and the mortgages were foreclosed in the court of chancery of New Jersey, and the mortgaged premises were sold under the decree on the seventh day of October, 1879. The sale failed to satisfy the mortgages, and a deficiency arose in the sum of \$21,290.40.

The bill alleges and the answer admits that under the decree of the surrogate of the city and county of New York, the accounts of the executors and trustees have been finally settled, and that they are authorized to retain, out of the funds remaining in their hands, the sum of \$14,034, as commissions, of which the share of the defendant is one-third, or \$4,678.20; that the defendant's share still remains undrawn; and that he refuses to apply such sum toward the payment of his indebtedness to the estate, and is insolvent. The defendant insists

that the facts do not present a case for equitable cognizance, and the complainant's remedy is at law.

Upon the facts alleged and proved the complainants are not required to maintain the suit, upon the theory that equity will set off the cross-demands of the parties, because of the insolvency of the defendant. The defendant is both an obligor and obligee in the bonds, and could not be both plaintiff and defendant in an action at law founded upon them. *Moffat v. Van Mullinger*, 2 Chit. 539; *Teague v. Hubbard*, 8 Barn. & C. 345; *Smith v. Lusher*, 5 Cow. 688. The remedy of the co-obligors is in equity. *Bradford v. Williams*, 4 How. (U. S. 576.) As is stated in *Brown, Parties*, 104-5, owing to the community of interest no action lies at law by one executor or administrator against his co-representative, but the remedy is in equity. See, also, *Smith v. Lawrence*, 11 Paige, 206. In *Warner v. Spooner*, 3 FED. REP. 890, the right of a bankrupt to prove against his estate a demand in favor of an estate of which he is an administrator, is placed upon the equitable jurisdiction possessed by courts of bankruptcy.

The complainants are therefore properly here to recover the deficiency arising upon the sale of the mortgaged premises, and as they have in their hands the funds out of which the defendant's commissions are payable, they can retain the sum due as his share, and apply it to reduce his indebtedness to the estate. It is insisted in defence of the action that the defendant is discharged from his indebtedness to the estate by his composition proceedings in bankruptcy. So far as the rights of the parties depend upon the effect of the composition it must be held, on the authority of *Paret v. Ticknor*, 16, N. B. R. 315; and *In re Calby*, MSS. U. S. Dist. Ct. S. D. N. Y., that the executors are entitled to be paid the composition percentage upon the amount of the indebtedness for which their security proved to be insufficient.

The defendant, while alleging the composition proceeding as a bar to the action, does not allege or prove that he has ever offered to pay the complainants according to the terms of the composition resolution. The creditor's debt is not discharged by the resolution only; it is discharged only when the terms of the composition are carried out. *Reiman v. Friedlander*, 13 N. B. R. 128; *In re Hatton*, L. R. 7 Ch. App. 723; *Edwards v. Coombe*, L. R. 7 Com. Pleas, 519; *Goldney v. Lording*, L. R. 8 Q. B. 182. The bankruptcy court, in the exercise of its supervisory jurisdiction, can enforce the composition as against creditors, or as against the debtor, but even that court will not restrain a creditor from pursuing his action to recover his debt when

the debtor has failed to carry out the provisions of the composition. In the present case the defence assumes the aspect of an accord without a satisfaction.

The sum due to the executors as unsecured creditors was not established until the sale of the mortgaged premises, October 7, 1879. That was a judicial sale, to which the defendant was a party, and he is concluded from asserting that the sum realized was not a fair sum. Doubtless a tender of performance of the composition resolution by the defendant at that time, or within a reasonable time after, would have satisfied the law. Whether in view of the subsequent delay the court of bankruptcy would interpose to require the executors to accept the composition percentage, and would have stayed this action to recover the indebtedness, is a question which does not require decision here; this court has not the power to do so. For present purposes the defendant is to be considered as seeking to avail himself of a discharge without having performed the conditions essential to its efficacy as a defence, and a court of equity can no more qualify or enlarge its operation than could a court of law.

A decree is ordered for the complainants adjudging due to them from the defendant the sum of \$21,290.40, with interest from October 7, 1879, and authorizing the complainants to apply thereon the sum of \$4,678.20, the defendant's share of the commissions, in discharge of the liability of the complainants' estate to the defendant personally, with costs to the complainants.

LYSTER, Adm'r, v. STICKNEY and others.

(Circuit Court, D. Colorado. June 14, 1882.)

1. PRACTICE—DISMISSAL—REMOVING PLEADING FROM FILES.

The dismissal of a suit or a part of a cause of action, or the withdrawal of a pleading, does not authorize the removal of the pleading itself, unless the court shall for good reason order that to be done. It remains a part of the record, and may be relied on if material and competent as evidence.

2. SAME—SUPPLEMENTAL BILL—DURESS.

An application to file a supplemental bill seeking to set up duress by threats made and carried out subsequently to the commencement of the suit, will be denied.

3. SAME.

An amendment setting up that the original complainant was, at the time of executing the papers sought to be set aside and cancelled, insolvent and largely

indebted, and that therefore the conveyances executed by him were void as against his creditors, who are now represented by the administrator, who has been substituted in lieu of the original complainant, should be allowed.

4 SAME—INJUNCTION—CONTINUANCE OF.

Where bill of complainant, as amended, is upon its face sufficient, and there is no showing outside the bill itself why the injunction allowed in the suit should be dissolved, a motion to dissolve must be overruled.

McCARY, C. J., (*orally.*) In the case of Lyster, administrator, against Stickney and others, several motions have been argued and submitted to the court. The first one is an application on the part of complainant to dismiss portions of the bill. He asks leave to dismiss the first and part of the third counts or subdivisions. The bill having been brought in the state court, under the laws of the state, contains several separate and distinct causes of action, set forth in separate divisions. It is a suit brought to set aside certain conveyances of real estate, and to cancel certain promissory notes, alleged to have been executed to the defendant Stickney by the original complainant. The portions of the bill which the plaintiff now seeks to dismiss charge what may be termed blackmail; that is, they allege that the defendant Stickney falsely accused the original complainant in this case with having debauched his wife, and other matters of a similar tenor, and thereby induced him to execute these papers.

There is no doubt but that the complainant has a right to dismiss his suit in whole or in part, and we are, therefore, very clearly of the opinion that he may dismiss the portions of the bill indicated in his application. Of course the pleadings will not be removed from the files, and will remain a part of the record. It is said on the part of the defendant that the allegations in question are important as matters of evidence in the case. If so, he will not be deprived of any benefit he is entitled to on that account. It is a well-settled rule of practice, and one to which we would allow no exception, that the dismissal of a suit or a part of a cause of action, or the withdrawal of a pleading, does not authorize the removal of the pleading itself, unless the court shall, for good reason, order that it be done. It remains a part of the record, and it may be relied upon if it is material and competent as evidence in the case. So that the application to dismiss part of the bill is allowed.

There is, furthermore, an application to file a supplemental bill. By this supplemental bill the present complainant, the administrator of the original complainant, seeks to set up two facts which he thinks are material. It having been alleged in the original bill that the deed and deed of trust and notes were executed under a threat made

by the defendant, that he would take the life of the original complainant if the papers were not executed, and that he would take his life if the notes were not paid at maturity, the present complainant now asks leave to file a supplemental bill alleging that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant. It is said that this fact is competent to show a continuing duress. If it is competent at all, it is competent as a matter of evidence, and not as a part of the complainant's cause of action. The rights both of the original complainant and of the present complainant, as his administrator, must depend upon the facts as they existed when the conveyances and the notes were executed. Subsequent facts may be competent testimony in the case to show the truth or falsity of the allegations of the bill concerning the facts as they existed at the time the papers were executed. Evidence is not to be pleaded, and if this particular fact of the subsequent killing of the complainant is admissible, it is only as evidence to establish the allegations of the original bill. It is not proper, therefore, that this fact should be pleaded. The application for leave to amend the bill by alleging the subsequent killing of the original complainant is denied.

The other fact which the complainant seeks to set up by way of amended bill is that Campau, the original complainant, was at the time of the execution of these papers insolvent and largely indebted, and that therefore the conveyances were void as against his creditors, who are now represented by the administrator, who has been substituted in lieu of the original complainant. We think that this amendment may be made. It is not necessary now to determine how far it may be material, or to what extent it will determine the final rights of these parties, but the fact, if it be a fact, that Campau was insolvent and largely indebted at the time he made these conveyances, may be alleged, and the court will reserve the consideration of that fact, and the rights of parties upon it, if it be established by proof. The permission to amend in this respect is allowed.

The remaining matter is the motion of the defendant to dissolve the injunction. There was an injunction allowed against the negotiation of these promissory notes, which were negotiable, and which were not due at the time the original bill was filed, and some of which are not yet due. After the amendments permitted by the order already made, the bill stands upon its face a good bill, alleging the execution of these instruments under duress, and a threat to take the life of the original complainant if he did not execute them. It is,

therefore, upon its face, a perfectly good bill. There is no doubt whatever that any contract executed under a threat to take the life of the party who executes it is utterly void, and may be set aside upon the application of any party injured. If it shall appear upon the testimony that these papers were executed without duress, as a part of a compromise of a claim against the original complainant for debauching the wife of defendant Stickney, it is doubtless a case with which a court of chancery should have nothing whatever to do. But that does not appear upon the bill as it now stands, and we hold that the bill upon its face is sufficient, and that the motion to dissolve the injunction must be overruled, there being no showing outside of the bill itself.

MOONEY v. HUMPHREY and others.

(Circuit Court, D. Colorado. June 16, 1882)

CONSTRUCTION OF STATE LAWS—RULE OF DECISION.

The question, what constitutes a corporation of a state, is necessarily a question depending upon the construction of the laws of the state, and upon such question the federal court will follow the rule of decision of the supreme court of the state.

On Motion for New Trial.

Wells, Smith & Macon, for plaintiff.

L. C. Rockwell, for defendants.

MCCRARY, C. J., (*orally*.) In this case there is a motion for a new trial, and to enter a verdict for the defendant. It is a suit brought by the plaintiff against the several defendants upon a bill of exchange. The defendants were the incorporators of a company which claims to be a corporation under the laws of Colorado. The suit is based upon the theory that there is no corporation, that the organization is void, and that the incorporators are liable, as partners, upon this contract. It is claimed, on behalf of the plaintiff, that the organization is not a legal corporation of Colorado, because the law of the state respecting the mode and manner of organizing corporations has not been complied with, in this, that the certificate of incorporation does not state that the stock shall be assessable or non-assessable. There is a provision of the statute that in every certificate of incorporation there shall be a statement showing whether the stock is assessable or not assessable. That is one ground upon which it is claimed that this is not a legal corporation. Another is that the incorporators are all

non-residents of this state; that they reside in New Jersey; that the certificate was executed and acknowledged in New Jersey; that the place of business is in New Jersey; the books are kept there; they had an agent in Colorado to transact their business, and that is all.

Upon these grounds the plaintiff claims that this is not a corporation, and that, therefore, these defendants, who are incorporators and who made this contract in the corporate name, are liable to him as partners. This identical suit was originally brought in the state court; there was a trial there, and judgment for the plaintiff. It was taken upon a writ of error to the supreme court of Colorado, and that judgment was reversed, the supreme court of the state passing upon all the questions to which I have called attention, and holding that the corporation is a legal one, and that the suit should have been brought against the corporation, and not against the incorporators as partners. The ruling will be found reported in the case of *Humphreys v. Mooney*, 5 Col. 282. And now the question is whether this court is bound by that ruling of the supreme court of Colorado, and must follow it as a rule of decision in this court. We are clearly of opinion that we are bound by it.

The question, what constitutes a corporation of a state, is necessarily a question depending upon the construction of the laws of the state. Corporations in this country are created by statute, and state corporations are created by state statutes. An examination of the opinion of the supreme court of Colorado will show that it is a construction of the law of this state upon the subject of corporations. As such, we are clearly bound by it upon general principles, and especially in cases of this character.

The supreme court, in the case of *Secombe v. Railroad Co.* 23 Wall. 108, held that "when the question is whether, under the constitution and laws of a particular state, a company professing to be a corporation is legally so, this court will receive, as conclusive of the question, the decision of the highest court of the state, deciding in a case identical in principle in favor of the corporate existence." It also falls clearly within the general principle that the federal courts are bound to follow the decisions of the state courts, construing their own constitution or statutes. It is clearly within the evil that is intended to be prevented by this rule, because, if we should hold this organization to be void and no corporation, while the state courts hold it valid, it would result that a non-resident creditor, who could invoke the jurisdiction of this court, would be able to sue stockholders and enforce

claims against them as partners, while a citizen of Colorado would be denied that right.

Upon the whole case, we are constrained to hold that the motion for a new trial must be sustained, and a verdict must be entered for the defendant, and it is so ordered.

See *Sonstiby v. Keeley*, 11 FED. REP. 578, and note, 581.

ROGERS v. MARSHALL.

(Circuit Court, D. Colorado. June 14, 1882.)

INTERLOCUTORY DECREE—REHEARING—PRACTICE.

On a petition for a rehearing upon an interlocutory decree in chancery, the court will, as a matter of course, continue the temporary execution of the decree till the hearing can be had, where to proceed under it might involve large expense, and but little time must elapse before such hearing can be had.

L. S. Dixon, for plaintiff.

Wells, Smith & Macon, for defendants.

MCCRARY, C. J., (*orally*.) Some time ago the court entered an interlocutory decree in this case, which settled, if it shall stand, some of the rights of the parties. It is a very important case, involving a large sum, and questions that are not entirely free from difficulty and doubt.

A petition for rehearing upon that interlocutory decree has been filed, and the court has ordered it to be heard, and fixed a time for hearing. The question now is whether the court shall suspend the execution of the interlocutory decree in the interim. It provides for an accounting, and to proceed under it might involve large expense, which in the end might be useless, and besides might cause an exposure of the private affairs of defendants, which, if the court should set aside the interlocutory decree, would not be a thing we ought to do.

The time is short, (the day for hearing is the twentieth of July,) and I apprehend no serious injury will result from a suspension of the accounting in the mean time. I think it is the rule almost without exception, that where a court entertains an application to set aside an interlocutory decree in a case in chancery, it will, as a matter of course, pending the hearing upon that application, suspend the execution of the decree. The order which has already been made

suspending temporarily the execution of this decree will be continued until the hearing can be had. I say this without expressing any opinion at all upon the merits of the application to set aside the interlocutory decree. I have not looked into the case sufficiently to form or express an opinion one way or the other upon the merits of the application.

MACKAY and others v. JACKMAN.

SAME v. SCOTT SOLE SEWING-MACHINE Co. and others.

SAME v. LEHMAN and others.

(Circuit Court, S. D. New York. April 15, 1882.)

PATENTS FOR INVENTIONS.

A mere process for making an article is not of itself a patentable invention.

Elias Merriam and *J. J. Storrow*, for orator.

J. C. Clayton, for defendants.

WHEELER, D. J. These suits are brought upon two patents originally granted to Lyman R. Blake, dated August 14, 1860,—one, No. 29,561, for an improvement in the construction of boots and shoes; and the other, No. 29,562, for an improvement in boots and shoes. These were to run 14 years, and August 13, 1874, were extended seven years. They were acquired by the orator, and the former was reissued in No. 9,043, dated January 13, 1880, and both have expired since these suits were brought.

Before Blake's inventions boots and shoes were made by pegging through the outer sole, upper, and inner sole, by sewing a welt to the inner sole and upper, and then sewing the outer sole to the welt. Some very light shoes were made wrong side out by sewing through the inner sole, upper, and part way through the outer sole, and then turned, and some very low shoes were made by sewing common stitches directly through the inner sole, upper, and outer sole. Sewing parts of uppers and pieces of leather and cloth for other purposes together by chain-stitches made by machine, by drawing loops of the thread through the material, without drawing the rest of the thread through, was then known and practiced; but no boots or shoes made by sewing the soles and upper together by such stitches, nor any method of so sewing them together, was then known. No means to which that place was accessible for setting the stitches had then been discovered.

Blake invented an improvement in sewing-machines by which the soles and uppers of all kinds of boots or shoes could be sewed together without any welt by that kind of stitches, and it was not useful for, nor adapted to, sewing any other kind of stitches, nor in any other place. This improvement was patented to him in letters patent No. 20,775, dated July 6, 1858, and was highly useful to the public. He made boots and shoes on his machine, and was undoubtedly the first to produce such boots or shoes, or to practice that mode of making them. He made application for a patent for this process of making boots and shoes, and for the boots and shoes made by this process, as a new manufacture, June 30, 1859. The specification was returned to him for the erasure of one of the claims, with information that claims for the process and product could not be considered in the same application, July 30, 1859. He withdrew the claim for the product, with notice that he intended to renew it in a separate application, April 16, 1860, and did renew it July 21, 1860. The machine patent was granted for 14 years, was extended seven years, was owned by the orator, and expired July 6, 1879. The defendant Jackman took a lease from the orator of a sewing-machine, with the right to use it under all three of the patents during the term of either for license fees for all boots and shoes made upon it and operated under that license. Since the expiration of the machine patent the defendant the Scott Sole Sewing-Machine Company has made machines for sewing these boots and shoes by this method, and sold them for use to the defendants in the other cases, who have used them. These bills are brought for relief against these acts as alleged infringement; and in the case against Jackman the bill covers any arrears of license fee there may be for the use of the machine, as this court has jurisdiction of that subject on account of the citizenship of the parties. No question as to that, however, is made for decision.

The machine patent appears to have always been of unquestioned validity. That was so related to the others that any question as to their validity would have been practically unavailing while that was in force, and no question appears to have been really made and contested about either until after that had expired, and the actual validity of these two patents as granted does not appear to have ever been contested until now.

In *McKay v. Dibert*, 19 O. G. 1351, these patents were in controversy. The infringement complained of appears to have been the use of a machine after the expiration of the machine patent. It seems to have been argued there that as the exclusive right to make

and use, and vend to others to be used, during the term of the patent had been granted in consideration of the full right which the public should have to the invention after the expiration of the term, the public would have the full right to the machine after that time, notwithstanding the other patents, and that they would practically be cut down to the life of the machine patent by the expiration of that. The court (Judge Nixon) appears to have held that the expiration of the machine patent left the machine free to all, except for use to infringe other patents with, but that its expiration could not affect the validity of other patents. That case is cited in the orator's brief at page 16, and this is all that is claimed from it. The same point was made upon the hearing on the motion for preliminary injunction in these cases, and was disposed of orally by Judge Blatchford upon the authority of that case. The question was also made whether a mere sale of the machine for use in making such boots and shoes would be an infringement, and it was held that it would be, and injunctions were granted. These questions appear to have been all that were then decided. A stenographic report of the proceedings upon that motion has been furnished and examined, and the question as to the validity of these patents when granted does not appear to have been considered. Both of these decisions, too, were made before those of the supreme court in *Miller v. Bridgeport Brass Co.* 21 O. G. 201, and in *James v. Campbell*, Id. 337. So the questions as to the validity of these patents as made in these cases are now to be passed upon.

The first step is to ascertain exactly what Blake did invent. There are many peculiar and valuable qualities of this kind of stitch when used to bind together the surfaces of leather. Only the loops of the stitches are drawn through as made, and the wax is not scraped off and the thread frayed and worn as is the case when each stitch is set by drawing the whole length of the thread through from the ends. Each loop as drawn to place tightens the preceding loop and makes the seam very close. And they can be sewed by machine and drawn tighter than by hand, making the binding together of the surface of the leather very firm. These qualities are very useful in the sewing together of the soles and uppers of boots and shoes, but none of them are peculiar to that work or to the work in that place. The same qualities existed in this kind of sewing as used in uniting parts of uppers and elsewhere, and he had the advantage of knowing all about them. Had it been desirable to sew seams like those through soles and uppers in boots and shoes where the uppers would not have been

in the way, it would have required no invention whatever to do it with the machines then in use and with this kind of stitch; or had it been desirable to so sew any seams, it would have required no invention to take these stitches for them. The fitness of the seams was apparent, but the uppers were in the way of employing them. Blake invented means for getting by the uppers and sewing the seams there notwithstanding the uppers. He used his means to sew the seams there and accomplished a great thing; but not because he had made a new kind of seam or given a seam any new quality, but because he had put a well-known seam in a difficult place. This was all due to the machine and its operation, and when he had patented the machine he had patented all there was of it. If, after he had made his machine, and before he had made a boot or shoe with it, some one else, knowing all about it, had, by hand or other known means, made boots or shoes by sewing the soles and uppers together with this stitch, that other person would not have been entitled to a patent for either the process of sewing, or the boot or shoe, for there would have been no invention in either. After knowledge of a machine to make a shoe in a particular manner there would be no room for an invention of that manner of making a shoe, or of a shoe made in that manner, and there would be no more room for the inventor of the machine than for any one else. It may be doubtful whether such a process or product as these is by itself patentable.

Mr. Justice Grier, in delivering the opinion of the court in *Corning v. Burden*, 15 How. 252, said:

"A process *eo nomine* is not made the subject of a patent in our act of congress. It is included under the general term 'useful art.' An act may require one or more processes or machines in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result; but when the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called 'processes.' A new process is usually the result of discovery—a machine of invention."

In *Cochrane v. Deener*, 94 U. S. 780, Mr. Justice Bradley said: "A process is a mode of treatment of certain materials to produce a given result. It is an act or a series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing."

This language of Mr. Justice Grier, with more to the same import, was quoted with approval by Mr. Justice Bradley in *Tilghman v. Proctor*, 102 U. S. 707. Neither of these definitions includes mere mechan-

ical operations like the looping and drawing thread to form stitches in sewing, either by machinery or by hand; and such operations, apart from the means for performing them, do not appear to be within the reach of protection by the patent laws. *O'Reily v. Morse*, 15 How. 62; *Howe v. Morton*, Curtis, Pats. 269; *Burr v. Duryee*, 1 Wall. 570. There is, of course, no doubt but that a boot or shoe might be the subject of a patent as an article of manufacture, but there would have to be something new about it as such in the sense of the patent laws. Blake did not invent a boot or shoe, nor a sewed boot or shoe, nor a boot or shoe sewed with this kind of stitches. All those were known and in use before. He invented a machine by which boots and shoes could be sewed with this kind of stitches in parts where they could not be so sewed before. The new effect was due to the operation of the machine. The patentability belonged to the machine, and not to the boot or shoe, as appeared before.

In *Collar Co. v. Van Dusen*, 23 Wall. 530, Mr. Justice Clifford, on this subject, said:

"Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production."

In this case that requisite does not appear.

Further, this machine, the process it went through with, and the work it wrought were so intimately connected that the machine could not be conceived of as an operative thing without involving the rest. The specification of the machine and its use in the machine patent included also a description of the process and product. This is shown by the patent itself, and is proved also by the testimony of experts examined as witnesses. It also appears to have been the view taken by Judge Nixon in *McKay v. Dibert*, where he suggests that a surrender and reissue of this patent in divisions would have avoided the incongruity arising from the expiration of the patents at different times.

In *Miller v. Bridgeport Brass Co.* it is strongly intimated that whatever a patentee describes in the patent and does not claim is abandoned to the public, unless it was omitted to be claimed by inadvertence or mistake, and a correction is sought immediately upon discovery of the omission. There is an allusion to the statute for defeating a patent by two years' public use and being on sale of the

invention, as an illustration or reason; but the case does not seem to hold that two years are to be allowed in which to reclaim what is so described.

In *James v. Campbell Norton* had taken out a patent December 16, 1862, for a post-marking and postage-cancelling stamp containing a combination of the post-marker and blotter and cross-bar connecting them, the blotter to be made of steel or other material which would answer its purpose, and to have on its face circular cutters enclosed in circular rings to cut the postage stamp at the time of defacing it with ink. The specification described and the drawing showed the whole. The claims were for the cancelling stamp separately, and for the combination of the cancelling stamp with the cross-bar. On the fifth day of January, 1863, 20 days after, he made application for a patent for post-marking and postage-cancelling stamp of the same construction as the other, except that the blotter was to be made of wood, cork, rubber, or similar material held by a tube fastened at one end of the cross-bar. The claims were for the blotter separately, and for the blotter in combination with the cross-bar and post-marking device. This patent was granted. It was several times reissued, but the validity of it as originally granted came under consideration, and especially the claim for the combination. This combination was not the same as that patented in the former patent in any sense. That was a combination of a blotter with a cross-bar only, while this was a combination of a different blotter with a cross-bar and post-marker. The whole of this combination was described in the former patent, except the difference in the blotter of these patents.

Mr. Justice Bradley said:

"It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he might get a patent for an invention before patented to a third person in this country if he could show that he was the first and original inventor, and if he should have an interference declared. Now, a mere inspection of the patents referred to above will show that after December, 1862, Norton could not lawfully claim to have a patent for the general process of stamping letters with a post-mark and cancelling stamp at the same time, nor for the general combination of a post-stamper and blotter in one instrument, nor for the combination of a post-stamper and blotter connected by a cross-bar, for all these things, in in one or other specific form, were exhibited in these prior patents."

The original patent was declared to have been invalid upon this ground.

As before shown, Blake's machine patent exhibited both the shoe of his product patent and mode of construction of his process patent, to which he was no more lawfully entitled than Norton was to his second patent for what was exhibited in the first. It is conceded in defendants' brief that there should be a decree for an account of license fees against Jackman.

Let decree be entered for an account of license fees in the case against Jackman, and dismissing the bill as to the residue, and dismissing the bills, with costs, in the other cases.

BRAINARD v. GRAMME.

(Circuit Court, N. D. New York. June 26, 1882.)

1. PATENTS FOR INVENTIONS—REISSUE.

Where a process patent was claimed in the reissue, and everything essential to the process was pointed out in the original patent nine years before the reissue, and in the mean time other inventors have occupied the ground covered by the general subject-matter of the invention, what was therein pointed out and not claimed is to be deemed abandoned to the public.

2. CLAIMS IN REISSUE—CONSTRUCTION—RULE OF.

Where claims in the reissue relating to the apparatus, considered literally, are broader than the claims in the original, describing the functions rather than the mechanism, they are to be construed with reference to the specification, and so, if consistent with the language used, as to secure to the patentee the invention which is described, but not so as to embrace any invention broader in its scope than that in the original invention.

3. INFRINGING PATENT.

The patent of defendant may be valid, and possibly his mechanism is an improvement on complainant's; but this will not protect him from the charge of infringement.

A. J. Todd, for complainant.

Edward Fitch, for defendant.

WALLACE, C. J. The doubtful question in this case is whether the reissued patent on which this action is founded is for the same invention as that described and claimed in the original. The original patent bears date June 5, 1869, and is for an improved machine for washing shavings in breweries. As described in the specifications, the invention consists of a hollow perforated shaft, in combination with a hollow cylinder, hung together in a frame, for the purpose of discharging a fresh current of water in jets upon the contents of the cylinder while it revolves. The frame is described merely as a strong

rectangular frame, supported on legs. The cylinder is made with open staves, or perforated sides, and is suspended horizontally in the frame in a hollow shaft. The shaft extends through the cylinder, and is perforated with a series of holes on all sides. One end of the hollow shaft is fitted to run in a thimble, on which is screwed a pipe for conveying water into the shaft; the other end of the shaft is closed, and carries a crank. The cylinder has a removable cover. In operation, the shavings to be washed are put into the cylinder, the cover is fastened, and the shaft is revolved by turning the crank; the cylinder rotates upon the shaft, and the current of water introduced into the perforated shaft is discharged in jets upon the shavings as their surfaces are presented by the revolution of the cylinder. The dirty water escapes through the openings of the cylinder at its lower side. The patentee states in his description that cylindrical washing-machines are in use, and he disclaims the same as his invention.

The first claim is "a hollow perforated shaft, in combination with the cylinder, and the frame arranged and operating substantially in the manner and for the purpose described."

The reissued letters bear date February 26, 1878, and herein the patentee attempts to secure to himself both a process and the apparatus for carrying out the process for washing breweries. The apparatus is described substantially as in the original patent, except that in the original the cylinder is described as suspended horizontally upon the hollow shaft and as rotating by the revolution of the shaft, while in the reissue the cylinder is not stated to be suspended horizontally, but so constructed as to admit of a rotating or reciprocating action. Considerable new matter, however, descriptive of the process is introduced. Two of the claims relate to the process. The third and fourth relate to the apparatus, and are as follows: "*Third.* The combination of a vessel capable of rotation on its axis with means for producing jets of water within it, substantially as described. *Fourth.* A vessel capable of rotation on its axis in combination with a perforated pipe for producing jets of water within such vessel, substantially as described."

So far as the reissue is an attempt to secure to the patentee the process for the treatment of brewers' shavings, it is entirely inoperative. The process as described and claimed therein is merely for the treatment of the shavings by the employment of the described apparatus. It is difficult to appreciate any practical benefit which is obtained by the patentee by calling his patent a process patent instead of one for the machine; and it is conceded that as everything essen-

tial to the process was pointed out in the original patent nine years before the reissue, and in the mean time other inventors have occupied the ground covered by the general subject-matter of the invention, what was therein pointed out and not claimed is to be deemed abandoned to the public, within the recent decisions relative to reissues. As to the claims for the process the complainant proposes to file a disclaimer.

The claims in the reissue relating to the apparatus, considered literally, are broader than the claim in the original. Indeed, they describe the functions rather than the mechanism of the apparatus. But they are to be construed with reference to the specification, and so, if consistent with the language used, as to secure the patentee the invention which is described. They are not to be construed, if the language will reasonably bear such an interpretation, so as to embrace any invention broader in its scope than that in the original patent.

In view of the state of the art, and of the apparatus described in the original patent and shown in the drawings, the patent was for a new combination of old parts, which consisted in locating the hollow perforated shaft within a hollow cylinder having openings in its sides and suspended horizontally in a frame, so that cylinder and shaft rotate together by turning the crank of the shaft.

The gist of the invention was in the adaptation of the several parts for the specific purpose described. The peculiar materials to be washed required special instrumentalities. A machine for cleaning rags, containing a revolving horizontal cylinder mounted on hollow axes, through which water can be conveyed to the contents of the cylinder and can escape through perforated plates at the end, is shown in the English patent to Foudriner of 1834. But in this patent there is not shown a hollow shaft running into the cylinder to discharge jets of water upon the contents of the cylinder.

A machine for forcing liquids into the contents of a vessel capable of rotation on its axis through a perforated vertical shaft, is shown in the English patent to Givine in 1851. But the contents are placed in cages of wire gauze, and the vessel itself is tight. These two English patents present the nearest approximation in the prior state of the art to the present. They are not anticipations; neither of them would do the work satisfactorily required of a machine for washing brewers' shavings. There can be no doubt that it required thought and inventive faculty to organize the distinctive features of these prior inventions into the present mechanism so as to adopt them to the special work to be done.

Reverting now to the claims of the reissue relating to the apparatus, the doubt which they suggest is whether they are not to be construed as so broad as to embrace a cylinder which is not horizontally suspended, and which is not rotated by means of the hollow shaft. The vessel capable of rotation on its axis and the perforated pipe for producing jets of water within such vessel are clearly referable to the cylinder and the shaft described in the specification, but the doubt is whether the specification in the reissue does not describe a cylinder which need not be horizontally suspended, and which will admit of a reciprocating as well as a rotating action upon the shaft. Considered in its entirety, it would seem from the specification that the horizontal cylinder is indispensable to the efficiency of the mechanism, and there is nothing in the description which refers to any means for conveying reciprocating action to the cylinder. In the absence of anything in the proofs to indicate any reason for an expansion of the claim, and in view of the apparent necessity of employing a cylinder which is suspended horizontally and is rotated by the shaft, the conclusion is reached that the fourth claim of the reissue can be sustained as substantially identical with the first claim of the original patent.

The defendant has appropriated the invention thus secured to the complainant, and it may be that the desire to protect the complainant against the piracy of his invention has led to undue liberality in the construction of the reissue. Precedents are not wanting, however, to justify such a broad construction. *Swan Turbine Manuf'g Co. v. Ladd*, 2 Banning & Arden, Pat. Cas. 488, is in point, where a more nebulous claim than the present was sustained by limiting it to the particular mechanism described. This case was affirmed by the supreme court. 102 U. S. 408.

It is not intended to intimate that the defendant's patent is not a valid one. Very possibly his mechanism is an improvement upon the complainant's, but this will not protect him from the charge of infringement.

The complainant will have a decree for an injunction and accounting, but without costs, upon making due proof or notice to the adverse party of the filing of a disclaimer as to the claim for the process according to law.

SEARLS v. BOUTON and others.

(Circuit Court, S. D. New York. February Term, 1881.)

PATENTS FOR INVENTIONS—IMPROVEMENT IN WHIP-SOCKETS.

Letters patent No. 231,510, for an improvement in whip-sockets, adjudged valid and infringed, and that reissued letters patent No. 9,297 are null and void, having been granted by the commissioner without authority.

In Equity.

J. P. Fitch, for complainant.

N. Davenport, for defendant.

WHEELER, D. J. This cause having been heretofore heard and a decision thereupon herein rendered to the effect that, the two said letters patent on which this suit is brought to-wit, letters patent No. 231,510, dated August 24, 1880, and reissued letters patent No. 9,297, dated July 13, 1880, were valid; that complainant was the owner thereof, and that defendants had infringed them and each of them; and the case having been opened upon motion of defendants for the purpose of putting in evidence the original letters patent No. 150,195, dated April 28, 1874, of which letters patent 9,297 is a reissue, and the cause having been further brought on for hearing on the said new evidence so introduced as aforesaid under the order granting defendants' motion:

Now, after hearing *J. P. Fitch*, Esq., of counsel for complainant, and *N. Davenport*, Esq., of counsel for defendants, it is adjudged that one John M. Underwood was the original and first inventor of the improvement in whip-sockets described and claimed in letters patent No. 231,510, dated August 24, 1880, and issued to Anson Searls as assignee; that the complainant, Anson Searls, is now the exclusive owner thereof; and that the same are valid and effective in law.

It is further adjudged that the defendants have infringed the said letters patent No. 231,510 by selling whip-sockets which contained the invention described and claimed therein.

And it is ordered that a perpetual injunction issue out of and under the seal of this court, enjoining and restraining the said defendants and each of them, their and each of their agents, attorneys, clerks, carriers, servants, and workmen, from making, using, selling, or in any manner disposing of, or parting with, during the unexpired term of said letters patent No. 231,510, any whip-socket containing, embodying, or in any manner counterfeiting or imitating the invention de-

scribed in said last-mentioned letters patent, or any whip-socket like, or substantially like, those heretofore sold by the said defendants, as proved by the testimony herein.

It is further ordered and decreed that the defendants account to the complainant for all the whip-sockets made, sold, or used by them, or either of them, or their agents, attorneys, clerks, carriers, servants, or workmen, or either of them, between the twenty-fourth day of August, 1880, and the date of said accounting, which are made substantially like those described and claimed in said letters patent No. 231,510, or that contain the invention therein set forth, and for all moneys and profits received or derived by them, or either of them, from the manufacture, use, or sale thereof, and for all damages that the complainant has suffered in consequence thereof.

It is further ordered that it be referred to S. Nelson White, Esq., of the city of New York, a master of this court, to take proof, report, and state such account with all convenient dispatch, and that on the coming in and confirmation of such report the said defendants pay to the complainant all the moneys made, or profits received and damages suffered, as may be so reported, with costs from and after the date of this decree.

It is further adjudged that the aforesaid reissued letters patent No. 9,297, dated July 13, 1880, are not for the same invention as that described and claimed in the original letters patent No. 150,195, dated April 28, 1874, of which they purport to be a reissue; that the said original patent was not inoperative or invalid by reason of a defective or insufficient specification, and that the commissioner of patents had no jurisdiction or power to accept the surrender of said original letters patent No. 150,195, and to grant said reissue No. 9,297.

It is therefore decreed that the said reissued letters patent 9,297, dated July 13, 1880, are therefore null and void, and that the complainant's bill of complaint, so far as the same relates to the said reissued letters patent, be and the same hereby is dismissed.

NOTE. This case was improperly reported. *Ante*, 140. The case was opened before entry of decree, and the original letters patent, No. 150,195, introduced in evidence, and the case reargued and resubmitted, when the above decree was entered declaring reissued letters patent No. 9,297 void.

N. D.

BONELESS FISH Co. v. ROBERTS and others.

CROWELL v. BEARDSLEY and others.

(Circuit Court, S. D. New York. June 17, 1882.)

PATENT FOR INVENTIONS—PROCESS FOR CURING FISH.

A patent construed as limited to a process for curing fish is not infringed by a similar process employed after the fish are cured.

R. W. Townsend and *A. R. Dyett*, for complainants.

Betts, Atterbury & Betts, for defendants.

WALLACE, C. J. In view of what was well known at the time of Atwood's invention, his patent is to be construed as limited to a process of curing fish in which the membrane or tissue between the flesh and the skin is removed during the process, and before the article is in a condition to be packed and boxed for the market.

The defendants buy the article fully cured, and even if they remove the membrane with the outer skin, they only do what any one has a right to do in preparing the article for cooking. The circumstance that this is done in order to make the article more marketable, does not alter the character of the act.

The bill is dismissed.

THE MARIA AND ELIZABETH.

(District Court, D. New Jersey. June 16, 1882.)

1. VESSELS—LIMITED LIABILITY OF OWNERS—DAMAGES—RES ADJUDICATA.

In proceedings by petition brought by the owners of the vessel under the limited liability act, (Rev. St. § 4283,) where the vessel has been decreed liable for damages sustained by a collision, the question of liability is *res adjudicata*, and in no way involved, and the losing party cannot revive and retry the case upon its merits.

2. SAME—DISTRIBUTION OF FUND IN REGISTRY.

The *pro rata* distribution of the fund, when the amounts are not sufficient to pay all claimants in full, provided for by Rev. St. § 4284, relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade and quality upon the wrong-doer.

3. SAME—PRIORITY OF LIEN FOR DAMAGES.

A decree for damages in a case of collision overrules all prior liens, including that for seamen's wages.

On Petition of Owners, etc.

Flavel McGee, for petitioners.

R. P. Wortendyke, for libellant.

NIXON, D. J. A decree was ordered in this case against the offending vessel for \$2,800 damages, and costs of suit. See 11 FED. REP. 521. The claimants, contesting all liability whatever, and failing to sustain their defence on the merits, expressed the intention of availing themselves of the benefits of the limitation of liability provided by section 4283 of the Revised Statutes. A stay of proceedings was granted to allow them the opportunity. *The Benefactor*, 103 U. S. 239.

The question of fault and general liability being fixed, the owners of the *Maria* and *Elizabeth* have filed a petition for relief. They set forth that the loss and damage occurred without their privity or knowledge; that since the collision three libels had been filed against the schooner,—one by Job H. Ridgway for wages, the second by the libellant in this case for the damages sustained by a collision with the schooner *Achorn*, and the third by William A. Wilkinson and others for wages; that the first and third were not contested by the claimants, and decrees had been duly entered therein in favor of the libellants; that the second was contested, the respondents denying all liability, and alleging in their answer that the collision was the fault of the officers and crew of the *Achorn*, and was brought about solely by their negligence, unskilfulness, and bad seamanship; that the issue had been decided against the *Maria* and *Elizabeth*, and on a reference the court had ascertained the damages to be \$2,800, besides the costs; and that the several decrees exceeded the value of the petitioners' vessel and the pending freight.

The petition further alleged that in the month of June, 1880, one of the petitioners, Joseph Headley, filed in this court a petition, setting forth that he was the master and principal owner of the *Maria* and *Elizabeth*; that the vessel was then in the custody of the marshal, under the three above-recited libels; that he wanted to procure the release of the vessel pending the litigation, and was not able to agree with the proctor of the libellant in this case as to her value, and asking for an appraisement; that appraisers were appointed by the court on June 3, 1880, who reported the whole value of the schooner to be, at that time, \$472.83; and that thereupon a stipulation was duly put in, with approved sureties, by which the said stipulators bound themselves in the said sum of \$472.83, conditioned that they should at all times, upon orders and decrees of the said court, or of any appellate court to which the said suits might be taken, upon notice

of such order or decree, pay into court the full value aforesaid, and abide by and pay the moneys awarded by any final decrees rendered by the court, or the appellant court, if an appeal intervened.

The petition further stated that the owners did not contest the claims in the two libels for wages, but denied their liability or that of their vessel for the damages occasioned by the collision with the Achorn; that they also desired to have the benefit of the limitation of liability provided by section 4283 of the Revised Statutes, and in case they should be ultimately defeated in the libel for the collision, to have the amount of their respective liability to all the libellants limited to the amount and value of the interest of each of the owners in said vessel and her freight then pending; that the value of the vessel had been ascertained to be \$472.83, and the amount of her freight then pending was \$69.50.

The prayer of the petition is that if it should be ultimately determined that the Maria and Elizabeth was liable for the collision, the court would make a final decree that the amount of the said stipulation for \$472.83, after the payment of costs and expenses, be divided *pro rata* among the claimants, and that upon the payment thereof the said Maria and Elizabeth and the petitioners may be forever discharged from further liability, and that they may have the benefit of appeal from any decree to be made, without further or other security than that heretofore given, or that required by the limited liability act, and that the testimony taken in the various causes may be used in the hearing of the application, or any appeal that may be taken, as though originally taken in this proceeding.

The answer of the libellant substantially admits the general allegations of the petition, but denies:

(1) That the collision happened and the loss and damage occurred without the privity or knowledge of the petitioners; (2) that the petitioners have the right in these proceedings to reopen the question of the liability of the Maria and Elizabeth for damages; and (3) that the court has the power to adjudge that the appraised value of the vessel should be distributed *pro rata* among the several libellants.

I think he is wrong in the first contention, and right in the second and third.

1. The first depends upon the construction of section 4283 of the Revised Statutes. That section, in its applicability to the present case, enacts that "the liability of the owner of any vessel for * * * any loss, damage, or injury by collision, * * * incurred without the privity or knowledge of such owner or owners, shall in no

case exceed the amount or value of the interest of the owner in such vessel and her freight then pending." The act is intended to encourage commerce, and ownership in its instrumentalities. Its benefits can be invoked only by such owners as have no "privity or knowledge" of the collision from which the loss or damage arises. The circumstances under which the accident occurred in this case are stated in the petition and admitted in the answer. The master was part owner, and on the night of the collision was on board, and was taking his full share in the navigation of the vessel. He had served out his watch at midnight, when the mate and two others of the crew took charge, and had gone to his berth, and was asleep at about 1 o'clock in the morning, when the two schooners collided. The wind was light, the night clear, and there was nothing in the situation that called for any special vigilance. Under these circumstances, to affirm that he had privity or knowledge of the collision would be giving such a narrow construction of the provisions of the law as to deprive all vessel-owners of the privileges of the act in cases where the master happens to have any interest, however small, in the vessel.

2. The question of the liability of the Maria and Elizabeth is *res adjudicata*, and is in no way involved in the application of the owners for the benefit of the limited liability act. It would be quite an anomalous proceeding, after a libel, answer, proofs, and adjudication by the judge, to allow the losing party to revive and retry the case upon its merits, on a petition allowed in the interest of vessel-owners for a very different purpose.

3. The *pro rata* distribution of the fund, when the amount is not sufficient to pay all claimants in full, provided for by section 4284 of the Revised Statutes, relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade and quality upon the wrong-doing vessel. A decree for damages on a cause of collision overrides all prior liens. There has been a struggle to except the wages of seamen, which are always looked upon with favor in the admiralty courts, but it has not been successful.

In the *Linda Flor*, Swabey, Adm. 309, Dr. Lushington held that the claim of a party having obtained a decree in a cause of damage is prior to that of a seaman for wages, assigning as a reason that the seamen are not shut up to their libel *in rem*, but may also maintain an action *in personam*, which cannot be done by one suffering damage from a foreign vessel. He was followed by Judge Lowell in

the case of *The Enterprise*, 1 Low. 455, partly because the vessel complained against was a British vessel, and hence subject to the English law, which postpones the lien of the seamen's wages to that of a libellant in a cause of damage, and partly upon the ground that seamen have other available remedies for their wages, and because mariners of the wrong-doing ship may be supposed to share in the fault of the vessel.

And the law is thus stated by the supreme court in *Norwich Co. v. Wright*, 13 Wall. 122, where Mr. Justice Bradley, speaking for the whole court, says: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage," etc.

But, without dwelling longer over the case, I am of the opinion that a decree should be entered against the claimants for the value of the vessel, \$472.83, and for the amount of pending freight, \$69.50, making the aggregate \$542.33; and that the libellant Thatcher is entitled to the same as against the claims of the other libellants for wages; and that when this sum is paid into court the owners of the *Maria* and *Elizabeth* should be discharged from all further liability on account of the collision.

This view renders the motion of the proctor of the libellant to amend the pleadings so as to make the case a proceeding *in personam* as well as *in rem* unnecessary and futile, as he can have no further claim against the owners for the damage and loss sustained.

See *The Maria and Elizabeth*, 11 FED. REP. 520, and note, 525.

THE POTTSVILLE.*

(District Court, E. D. Pennsylvania. May 5, 1882.)

1. ADMIRALTY—COLLISION—NEGLIGENCE—LOOKOUT.

A steam-ship moving at the rate of four miles an hour, in a rough sea and dense fog, on a frequented part of the Atlantic coast, collided with and sank a schooner. At the time of the collision the only lookout on the steamer was a boy 16 years of age, who had been upon the water but a few weeks. *Held*, that the steam-ship was liable for the damage: *First*, because under the circumstances the utmost caution was required, and four miles an hour was too great a speed, being more than was necessary for steerage way; and, *second*, because it was culpable negligence to have an inexperienced boy as lookout.

In Admiralty. Libel for collision.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

The facts were as follows:

On June 9, 1881, at about 5:10 A. M., the steam-ship Pottsville collided with the schooner Joseph and Franklin in the Atlantic ocean, between Hereford inlet and Five Fathom bank light-ship. At the time of collision the course of the steam-ship was about S. W. by W.; that of the schooner N. N. E. The wind was light and from the eastward; the sea was rough, and there was a dense fog. The schooner had a competent lookout, and the master himself was in charge of the deck. The fog horn was continually sounded. The steam-ship was going at the rate of four miles an hour and had but one lookout, a boy of 16 years of age, who had had some five weeks' experience afloat. The whistle of the steam-ship was blown every minute. The direction of the wind was such as to increase the acoustic properties of the steam-whistle and to diminish those of the fog horn. The whistle of the steam-ship was heard on board the schooner some time before the collision, and the course of the schooner was kept unchanged. The fog horn of the schooner was not heard on the steam-ship until immediately prior to the collision, and was then promptly reported by the lookout. The schooner was seen an instant after, about 40 yards distant. The wheel of the steam-ship was put hard a-port, and she was stopped and backed under full speed. Immediately afterwards the schooner was struck and subsequently sank.

The libellant contended that the steam-ship was going at a higher rate of speed than was necessary for steerage way or consistent with safety in such weather and locality, and that it was negligence, under the circumstances, to entrust the position of lookout to a boy of little experience. The respondents contended that the steam-ship could not have been handled at a less rate of speed; that the schooner was seen by the boy on lookout as soon as it was possible for any one to have seen her; and that the collision was the result of inevitable accident, neither party being at fault.

Theodore M. Etting and Henry R. Edmunds, for libellant.

Thomas Hart, Jr., for respondent.

BUTLER, D. J. The burden of proof is on respondent. Having run the libellant down, she must prove it was not her fault. The answer charges it to libellant's failure to signal. On the argument it was attributed to this cause, and to inevitable accident.

I cannot doubt that the schooner signaled, as required by law. Her testimony puts this beyond question.

That the accident was inevitable I do not believe. It may properly be attributed, I think, to want of care in respondent. The circumstances were such as to call for the highest degree of vigilance. A dense fog prevailed, the sea was rough, and the respondent was steaming on one of the most frequented parts of the Atlantic coast, —momentarily liable to find vessels directly in her way. That she was not vigilant is clear. At the time of collision the only person forward, on deck, was a boy of 16 years, with no experience, having

been upon the water but a few weeks. To entrust the responsible and delicate duty of lookout, in such weather, and in such a place, to this raw youth, was culpable negligence. It is said, however, that this had no influence upon the result, or accident, that he saw the schooner as early as she could be seen through the fog, and heard her horn as soon as it was blown. If this were true, the fact would remain that respondent had been negligent of a most important duty, under circumstances requiring the greatest care, justly casting serious doubt over the entire defence. I do not, however, believe it is true. An experienced seaman, alive to the dangers of the situation, and the necessity for extraordinary vigilance, would doubtless have discovered the schooner's presence in time to avoid the collision. In respect to speed also, I believe the respondent failed in duty. It cannot well be doubted that she was moving at the rate of four miles an hour, and I think upwards, while her progress should have been no greater than was actually necessary to afford steerage way. It is true her witnesses say her speed was no greater than necessary for this purpose; but I think the conclusion is quite reasonable that she might have controlled her course at a lower rate. Whether under the peculiar circumstances of weather and place, it was her duty occasionally to stop, as the captain of the *Arbutus*, who was a short distance off did, need not be determined. It very clearly was her duty to proceed with the utmost caution, feeling her way, and endeavoring by every practicable means to avoid the dangers known to be in her path. In this duty I believe she failed.

A decree must be entered for libellant with costs.

The court propounded certain questions to a nautical expert called as an assessor, which, with the answers thereto, were as follows:

First. Under the circumstances stated by the Pottsville's officers, at and preceding the collision involved in this case, was it prudent to entrust the duty of lookout to a boy of 16, with but a few weeks' experience on the water?

Answer. There are no circumstances under which a vessel can be placed that require more vigilance on the part of the lookout than in a dense fog, as is described by the officers of the Pottsville, and she, being at the time in the track of vessels bound up or down the coast, the danger of collision was great, and too much precaution could not be taken; it was therefore imprudent to entrust the duty of lookout to an inexperienced boy. On the contrary, under the circumstances, more than ordinary caution should have been used. To detect an object through a fog, the range of vision should be confined to as narrow a limit as possible. It would therefore have shown no extraordinary caution had two men been placed on the lookout, one looking from each bow. In fact, in a dense fog, all the watch on deck should constitute a lookout.

Second. Would an experienced seaman have been likely to see the schooner or discover her presence earlier than this boy? *Answer.* An experienced seaman, accustomed to looking for and seeing vessels under all circumstances, and listening for signals in fogs, would be more likely to see a vessel and distinguish a signal, and locate the direction from which the sound came, than an inexperienced person.

Third. Do you know the Pottsville? *Answer.* I know the steamer Pottsville.

Fourth. If you do, state whether under the circumstances detailed by her officers, as existing at the time, she could or could not have controlled her course at a lower rate of speed than four miles an hour? *Answer.* In regard to the rate of speed under which the Pottsville could have controlled her course, under the circumstances as stated, I see no reason why the steamer going three miles an hour should not have been under perfect control.

THE PLYMOUTH ROCK, etc.

(*District Court, S. D. New York. June 12, 1882.*)

1. TOWAGE SERVICES—PASSENGER STEAMER.

To entitle a libellant to recover salvage compensation for towage services the claimant's vessel must be shown to have been in either actual or apprehended danger at the time the services were rendered.

2. PRACTICE—COSTS.

Where salvage compensation was claimed for towage services, and the answer admitted the claimant's liability for a reasonable towage compensation, the libellant recovered a reasonable sum for towage, without costs, and was adjudged to pay the United States marshal's costs.

In Admiralty.

This was a libel filed by the master and owner of the steam-boat City of Richmond, to recover \$5,000 as salvage compensation for assistance rendered to the steam-boat Plymouth Rock, under the circumstances described in the opinion of the same court, reported in *The Plymouth Rock*, 9 FED. REP. 413, 415, *et seq.*

Lorenzo Ullo, for libellant.

Sidney Chubb, for claimant.

BROWN, D. J. When the aid of the City of Richmond was requested by the captain of the Plymouth Rock, the latter, as I find upon the evidence, was neither in actual nor apprehended danger, being in tow of the Germania, which was fully able to take care of her. The request for aid was merely to expedite her passage and to take off her passengers for their more convenient landing. It is not, therefore, a case of salvage.

The libellant is entitled to a reasonable sum for towage and taking passengers. If the parties do not agree, a reference on that point may be taken.

The costs up to this time are allowed, and the libellant should pay the disbursements on the arrest of the vessel.

Bonds in Aid of Railroads.

TOWNSHIP OF NEW BUFFALO *v.* CAMBRIA IRON Co., Sup. Ct. U. S. Oct. Term, 1881. Error to the circuit court of the United States for the western district of Michigan. Plaintiff, in the court below, recovered judgment on certain bonds which were issued to a railroad company by the plaintiff in error to aid in the construction of a railroad, and by the railroad company transferred to defendant in error. The bonds had been issued to the railroad company under authority of an act of the legislature of the state. On the part of the plaintiff in error it is contended that by the settled law of the state as it existed when the bonds were issued they were void. The decision of the supreme court of the United States was rendered on March 27, 1882, Mr. Justice *Harlan* delivering the opinion of the court affirming the judgment of the circuit court.

Where, by the law of the state as expounded by its supreme court and acted upon by its legislative and executive departments, bonds issued to a railroad company were held valid obligations of the municipality by whom they were issued, this court will not feel bound to follow later decisions of the state supreme court modifying their former opinions. The defendant in error is a *bona fide* holder for value, and his rights and obligations depend upon the same rule. In the absence of constitutional provisions making a distinction between municipal subscriptions to stock and municipal appropriations of money or credit, there is no solid ground upon which the legislature can rest such a distinction. That the bonds were voted to one railroad company, and were delivered to a consolidated company, will not invalidate them, as they must be deemed to have been given in view of the then-existing statute authorizing two or more railroad companies forming a continuous or connected line to consolidate and form one corporation and investing the consolidated company with the powers, rights, property, and franchises of the constituent companies.

H. F. Severens, for plaintiff in error.

W. J. Smiley, for defendant in error.

Cases cited in the opinion: As to constitutionality of state law, *Taylor v. Ypsilanti*, 4 Morr. Tr. 326, followed; and *People v. Salem*, 20 Mich. 452; *Bay State v. State Treasurer*, 23 Mich. 499; *Thomas v. City of Port Huron*, 27 Mich. 320, not followed. Rights of holder for value: *Railroad Co. v. National Bank*, 102 U. S. 14. Donations and descriptions: *Railroad Co. v. County of Otoe*, 16 Wall. 674; *Olcott v. Supervisors*, 16 Wall. 678; *Town of Queensbury v. Culver*, 19 Wall. 91. Consolidation of railroads: *County of Scotland v. Thomas*,

94 U. S. 682; *Town of East Lincoln v. Davenport*, Id. 801; *Wilson v. Salamanca*, 99 U. S. 504; *Nugent v. Supervisors*, 19 Wall. 252; *Empire v. Darlington*, 101 U. S. 91; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 574; *Tipton Co. v. Locomotive Works*, Id. 532.

Fraudulent Representations—Property Value.

GORDON v. BUTLER, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the northern district of New York. This was an action for alleged fraud in obtaining a loan upon insufficient security. The decision was rendered in the supreme court May 8, 1882. Mr. Justice *Field* delivered the opinion of the court, reversing the judgment and remanding the cause for a new trial.

The law does not hold one responsible for the extravagant notions he may entertain of the value of property dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature conjectural and uncertain. A statement of an opinion assigning a certain value to property, like a mine or quarry not yet opened, is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value. Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce; but for opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such as the capacity of boilers or the strength of materials, or for opinions of parties possessing special learning or knowledge upon the subject, the case may be different; and for false statements, where deception is designed, and injury has followed from reliance on them, an action may lie.

Leslie W. Russell, for plaintiff in error.

Harry Bingham and A. X. Panser, for defendant in error

Case cited: *Holbrook v. Connor*, 60 Me. 578.

Internal Revenue.

UNITED STATES v. RINDSKOPF, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Wisconsin. The decision of the supreme court was rendered on April 24, 1882. Mr. Justice *Field* delivered the opinion of the court, reversing the decision of the circuit court and remanding the case for a new trial.

The assessment of the commissioner of internal revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability, and if not impeached it was sufficient to justify a recovery; but every material fact upon which his liability was asserted was open to contestation. The distiller and his sureties were at liberty to show that no spirits, or a less quantity than

that stated by the commissioner, were distilled within the period mentioned, and this entirely, or in part, overthrows the assessment. They were at liberty to show a payment of the tax in whole or in part, and thus discharge or reduce the liability. To the extent, however, in which the assessment was impaired, it was evidence of the amount due. It was error, therefore, to instruct the jury that the assessment was to be taken and considered in its entirety, and that the government was entitled to recover the exact amount assessed or not any sum. A decree in the equity suit is not a bar to the prosecution of the action against the principal and sureties on a distiller's bond, in the absence of proof that the assessment which it adjudged invalid covered the spirits upon which the assessment in this suit was made.

S. F. Phillips, Solicitor Gen., for plaintiffs in error.

J. P. C. Cottrill, L. Abraham, and C. E. Mayer, for defendants in error.

Public Land—Claim of Right to.

SIMMONS v. OGLE, U. S. Sup. Ct. Oct. Term, 1881. Appeal from the circuit court of the United States for the southern district of Illinois. Appellant recovered judgment in an action of ejectment on a patent from the United States. Defendant in that action brought suit in chancery to compel a conveyance of the legal title to himself, on the ground of a superior equity, and prevailed in his suit, from which this appeal is taken. The case was decided in the supreme court of the United States on April 10, 1882. Mr. Justice *Miller* delivered the opinion of the court, reversing the decree of the circuit court.

The laws encouraging settlements upon the public lands are so indulgent, and so numerous are these settlements, that the weight of the inference in favor of any claim of right on the part of a settler, whether legal or equitable, against the United States, growing out of the mere possession, is very slight, and a party claiming land, as against a patentee, on the ground of a superior equity, has cast upon him the necessity to make clear and satisfactory proof of his superior equity. In all completed sales of the public land, besides the entry in the books of the local land-office, two other documents of superior probative force usually attend the sale, which together constitute the certificate of sale,—the first signed by the register giving a description of the land, the amount paid, and the name of the purchaser; the second signed by the receiver, which is a simple receipt for the price; and in the absence of a patent these documents must be produced to establish any claim of right.

R. A. Halbert and F. A. McConaughty, for appellant.

J. L. D. Morrison, for appellee.

Bill of Review.

BURLEY v. FLINT, Sup. Ct. U. S. Oct. Term, 1881. This was an appeal from the circuit court of the United States for the northern district of Illinois. A bill of review had been filed in the circuit court seeking to reverse so much of the former decrees of the court in a foreclosure suit as denied the statutory right of redemption given by the laws of the state in regard to land sold under such decrees. A hearing was had on motion to dismiss the bill, which, by consent of counsel, was to be treated as a demurrer, and the court dis

missed the bill, from which order this appeal is prosecuted. The decision was rendered on March 13, 1882, affirming the decree of the circuit court. Mr. Justice *Miller* delivered the opinion of the court.

Where appellant does not seek to reverse the order of sale to satisfy the amount due to the mortgagee, nor ask that the sale made under that order be set aside and a new sale ordered, nor make any offer to redeem by payment of the amount found due on the original mortgage, nor offer to pay the amount bid at the sale by the mortgagee or tender any sum in court as assurance that he will do so, but simply asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed, his bill of review was properly dismissed.

Francis H. Kales, for appellant.

E. B. McCagg, for appellee.

Cases cited in the opinion: *Brine v. Ins. Co.* 96 U. S. 627; *Suitterlin v. Conn. Mut. Ins. Co.* 90 Ill. 483.

Corporation—Conduct of its Affairs.

OGLESBY v. ATTRILL, U. S. Sup. Ct. Oct. Term, 1882. Error to the circuit court of the United States for the district of Louisiana. Mr. Justice *Field* delivered the opinion of the supreme court on May 8, 1882, affirming the judgment of the circuit court.

In conducting the affairs of a corporation, as to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. Nor will they examine into the affairs of a corporation to determine the expediency of its action, or the motives of it, when the action itself is lawful. A compromise effected between stockholders and the corporation, by which all claims arising from the assessment and the alleged fraudulent purposes of the officers in connection with it stands as a judgment, and protects from further suit equally those who advised and those who levied the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as actors.

Henry B. Kelley, Richard De Gray, C. B. Singleton, and H. R. H. Browne, for plaintiffs in error.

Thomas J. Semmes and S. T. Wallis, for defendant in error.

Cases cited in the opinion: *Bailey v. Birkenhead*, *Lancashire & C. J. R. Co.* 12 Beav. 439; *Adle v. Prudhomme*, 16 La. Ann. 343.

Negligence.

SCHEFFER v. WASHINGTON CITY, V. M. & G. S. R. Co., 5 N. J. Law J. 169. Error to the circuit court of the United States for the eastern district of Virginia. This is an action brought by the executor of deceased to recover of a railroad company damages for the death of a party alleged to have resulted from the negligence of the company while carrying deceased on their road. A demurrer was interposed on the ground that the negligence alleged was too remote as a cause of death to justify recovery, the proximate cause

being suicide of decedent—his death resulting by his own immediate act. The cause was decided by the supreme court of the United States in the October term, 1881. Mr. Justice *Miller* delivered the opinion, affirming the judgment of the circuit court, to the effect that where the proximate cause of death was his own act of self-destruction, superinduced by mental aberration, physical suffering, and disease, the railroad company will not be liable.

Cases cited: *Insurance Co. v. Tweed*, 7 Wall. 44; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *McDonald v. Snelling*, 14 Allen, 294.

Removal of Cause—Separable Controversy.

CORBIN v. VAN BRUNT, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of New York. The case was decided in the supreme court on May 8, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court, affirming the order of the circuit court.

Where the real controversy is about the right to the possession of land, and so far as the title is concerned it appears that citizens of the state in which suit is brought are the only parties interested, and they occupy both sides of that controversy, the cause is not removable under the second clause of section 2 of the act of 1875, as there are no separate controversies, such as admit of separate and distinct trials.

Randall Hagner, for plaintiff in error.

J. J. McElhone and Joseph K. McCammon, for defendants in error.

Cases cited in opinion: *The Removal Cases*, 100 U. S. 457; *Blake v. McKim*, 103 U. S. 336; *Hyde v. Ruble*, 3 Morr. Tr. 516.

Removal of Causes—Revenue Cases.

VENABLE v. RICHARDS, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Virginia. The opinion in this case was delivered by Mr. Justice *Harlan* on May 8, 1882, affirming the judgment.

Section 643 of the Revised Statutes, providing for the removal of both civil and criminal prosecutions of a limited class arising under the laws of the United States without regard to the amount involved, is not in conflict with the act March 3, 1875, providing for the removal of civil causes to the circuit court; and the act of 1875, so far as it embraces suits arising under the laws of the United States, does not preclude a removal of a suit of the class defined in section 643.

W. P. Burwell, for plaintiff in error.

S. F. Phillips, Solicitor Gen., for defendant in error.

Patents for Inventions—Reissue, when Void.

JOHNSON v. FLUSHING & NORTH SIDE R. Co., U. S. Sup. Ct. Oct. Term, 1881. Appeal from the circuit court of the United States for the eastern district of New York. The decision was rendered on May 8, 1882. Mr. Justice *Woods* delivered the opinion of the court, affirming the decree of the circuit court. Where the original patent could not be fairly construed to embrace

the device used by the appellee, which appellants insist is covered by their reissue, if the reissued patent covers it, it is broader than the original and is therefore void. Even if a patentee has a right to a reissue if applied for in seasonable time, the right may be lost by his laches and unreasonable delay. Where it is shown that the invention which appellants contend was covered by the original patent had been in general use long before the date of its issue, the patent is invalid.

Thomas Bracken and B. F. Butler, for appellants.

Andrew McCallum and S. D. Law, for appellee.

Cases Cited in the opinion: *Giant Powder Co. v. Cal. Vigoret Powder Co.* 6 Sawy. 508; S. C. 5 Fed. Rep. 197; *Powder Co. v. Powder Works*, 98 U. S. 126; *Ball v. Langles*, 102 U. S. 128; *James v. Campbell*, 3 Morr. Tr. 438; *Miller v. Bridgeport Brass Co.* Id. 419.

Patent for Inventions—License.

MELLON v. DELAWARE, L. & W. R. Co., U. S. Sup. Ct. Oct. Term, 1881. Appeal from the circuit court of the United States for the western district of Pennsylvania. The decision on appeal was rendered by the supreme court of the United States on April 3, 1882, Mr. Justice Woods delivering the opinion, affirming the decree of the circuit court.

Where the case turns upon a single fact, as whether or not a license was absolute and unconditional, as it appears on its face, the burden of proof is on him who asserts the affirmative, and if the weight of evidence is against him the decree dismissing the bill charging an infringement will be affirmed.

H. T. Fenton and Furman Sheppard, for appellants.

PACIFIC RAILROAD (of Missouri) v. MISSOURI PACIFIC RY. Co. and others.

(Circuit Court, E. D. Missouri. April, 1881.)

1. EQUITY—PRACTICE—IMPEACHING DECREE—FRAUD.

On a bill for relief against a decree obtained by fraud, no relief will be granted if complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit; nor if complainant might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit.

2. SAME—BILL OF RELIEF.

A bill seeking relief from a decree obtained by fraud must allege that complainant had no knowledge of the fraud now alleged, and no notice thereof at the time of the original suit.

3. CORPORATION—KNOWLEDGE OF STOCKHOLDERS.

Upon the question of notice there is no distinction between the corporation and its officers or stockholders; so, if stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on in the original suit, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches.

4. STOCKHOLDER—LACHES—LOSS OF REMEDY.

Where the stockholders, having full knowledge of all the facts and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, and in the mean time the decree had been fully executed, the property sold thereunder to a new company and the sale confirmed, and the stock and bonds of the new company gone into the market, it is too late for them to obtain relief from a decree alleged to have been obtained by fraud.

Bill in Equity to set aside a decree of this court for fraud.

Glover & Shepley, for complainant.

Melville C. Day, *J. O. Broadhead*, and *Thos. J. Portis*, for respondents.

MCCRARY, C. J. This is either an original bill to impeach a decree of this court for fraud, or a bill of review upon newly-discovered facts and evidence. We think it is the former; and as that is in accordance with the claim of complainant's counsel, we will so regard it, remarking, however, that if it be the latter it is clearly bad, because filed too late, and also because filed without the leave of the court. *Ricker v. Powell*, 100 U. S. 109; *Story*, Eq. Pl. §§ 412-414.

Considered as an original bill, is it sufficient? Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud. The rules by which the sufficiency of such bills are to be determined are the same,

whether the purpose be to set aside a judgment at law or a decree in chancery. *U. S. v. Throckmorton*, 98 U. S. 61.

Among these rules are the following:

(1) No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit. *Foster v. Wood*, 6 Johns. Ch. 86; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Kibbe v. Benson*, 17 Wall. 627.

(2) Nor will relief be granted if the complainant might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit. *U. S. v. Throckmorton*, *supra*.

Applying these rules to the present case we are brought at once to the inquiry whether the present complainant, a corporate body, which was a defendant in the suit of Ketchum, had notice of the fraud now alleged, or might have learned the facts by proper diligence, and might have pleaded them in that suit. We find no allegation in the bill charging that the complainant was ignorant of the facts pending the original suit, much less that it was unable after due diligence to ascertain and plead them. In this respect the bill is insufficient. There is a want of these material affirmative allegations. But the demurrer goes further, and raises the question whether the bill and exhibits do not show affirmatively that the present complainant, through its stockholders, had notice of the foreclosure suit, knowledge of the defence now insisted upon against the third-mortgage bonds, and ample opportunity to make that defence.

It is, we think, very clear that, in considering the question of notice, no distinction can be made between the corporation and its officers and stockholders. We cannot separate them and say the officers and stockholders knew of the fraud, but the corporation did not. If, therefore, the stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on therein, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches.

That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defence, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the directors to resign that others might be appointed in their place who would properly attend to the duties of their office;

also that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum.

It further appears that at a meeting of stockholders held March 27, 1876, at St. Louis, several months before the rendition of the decree of foreclosure, a resolution was adopted requesting the directors to employ counsel to aid in the defence of the foreclosure suit. This meeting was held while the suit was pending, and in the city where the court was sitting. See record *Ketchum Case*, 50. It was not enough for the stockholders to content themselves with the passage of this resolution, especially as the bill avers that it was disregarded. They were bound to go forward, with due diligence, in the assertion of their rights, which they knew were imperilled; and we see enough in the record to satisfy us that they would have done so but for the fact that they, or their managing committee to whom they entrusted their interests, afterwards became satisfied with and assented to the decree.

It is very apparent that the stockholders were dissatisfied with the action of the directors and attorney of the company in the defence of the foreclosure suit. They were therefore put upon inquiry, and bound to do whatever it was in their power to do to protect their interests. Any individual stockholder was at liberty to apply to the court for leave to intervene and defend. The stockholders were parties in interest, and upon representing that fact to the court and showing that the officers were not defending in good faith, they would, without doubt, have been allowed to defend. That the court in that case recognized the propriety of this is clear from the fact that several stockholders asked and readily obtained leave to appear and defend.

It may be true, as a general proposition, that the stockholders of a corporation are not bound to intervene in a suit against the corporation for the protection of their rights. If the officers fraudulently consent to judgment or decree, the stockholders may, perhaps, afterwards file a bill to set it aside, provided they do so within a reasonable time after the discovery of the fraud. But we do not think it can be maintained that the stockholders of a corporation, who have notice that the officers are not faithfully defending a suit, can neglect to intervene, or to take any steps in the way of endeavoring to do so; permit final judgment or decree to be entered and sale to take place, and then, after years have elapsed, be permitted to attack the validity of the proceedings.

If this were not a rule applicable generally to all corporations, it would still, we think, apply to this particular corporation, for the reason that its charter vests in the stockholders, in annual meeting assembled, power to do and perform all corporate acts authorized by the charter. Laws Mo. 1851, p. 268.

We have already seen that the stockholders were aware of the suit; that their attention was directed to it; that they distrusted the officers of the corporation, and took steps looking to the assertion of their rights. It is also apparent, from the record of the proceedings in the *Ketchum Case*, that they knew the facts now set up by way of defence. Akers, one of their number, and also the county of St. Louis, on behalf of themselves and such other stockholders as might join therein, appeared in said suit, and by leave of court answered and filed cross-bills, setting forth in substance the principal facts now relied upon. Record *Ketchum Suit*, 24.

It was therefore correctly stated by the judges of this court, in their return to the alternative writ of *mandamus* in *Ex parte Cutting*, that "said Cowdrey and all other stockholders who might join with him were in court during all proceedings of the term when the decree of foreclosure and sale was entered, and had the fullest opportunity to intervene by joining in the answers and cross-bills filed by Akers and said St. Louis county, and otherwise."

This, upon the ground that the stockholders were bound to take notice of the proceedings of the stockholders' meetings, and were also bound by the action of their committee appointed to represent them in this litigation, as well as upon the further ground that some of their number actually appeared and were admitted as parties to the suit. We are therefore constrained to hold that the stockholders were concluded by the decree and sale, and that whatever concludes the stockholders individually and collectively concludes the corporation as well. Another consideration has great weight with us. The stockholders of the Pacific Railroad, having knowledge of all the facts, and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either during a period of four years. In the mean time the decree had been fully executed; the property had been sold and the sale had been confirmed; the purchaser at the sale had conveyed to a new corporation, which had issued new stock and executed negotiable bonds for large sums secured by mortgage upon the property. The stock and bonds of the new company have gone into the market.

Whether it is all held by innocent purchasers we are, of course, in the absence of proof, unable to say, but the facts and circumstances to which we have adverted certainly furnish strong reasons for holding that the stockholders and the corporation have been guilty of laches. The case of *Wetmore v. St. Paul, etc., R. Co.* 1 McCrary, C. C. 466, was a bill by stockholders to set aside a sale and the decree of foreclosure upon facts somewhat similar to those presented by the present bill.

Mr. Justice Miller in that case said:

"The purpose of the petition is no less than to set aside the sale of a railroad, which is, perhaps, worth \$20,000,000 or more,—a road which has been reorganized since the purchase, with a new set of directors, a new set of stockholders, very largely, and, above all, a new set of bondholders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in possession of the road over a year, and has issued, as I say, some ten or fifteen million dollars of new bonds, held all over the world; and now original bondholders in the old company representing \$1,500,000 come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road."

And again:

"The sale was had. A part of the original bondholders were, under a special organization, according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into court. He did report it, and the sale was confirmed.

"Now, that sale being confirmed, a deed made by the master, property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name, doubtless a great deal of the stock that they held passed into the hands of other men,—certainly the bonds that they issued upon the strength of that new organization to the extent of \$8,000,000 having passed into the hand of other men,—these parties now, for the first time, come into this court and ask that they be permitted to upset all the transactions; to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

"No authority is shown, no precedent is shown, and I do not believe any can be shown for such a proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done."

Numerous other questions, and some of them important, and perhaps doubtful questions, have been discussed at the bar, but the conclusion reached renders their decision unnecessary. Among them is

the important question, whether, regarding this as an original proceeding to set aside a decree of this court for fraud, the court has jurisdiction irrespective of the citizenship of the parties.

Another is the question whether such a bill, like a bill of review on the ground of newly-discovered facts, must be filed within the period for taking an appeal. The affirmative of the latter proposition seems to have been held in Massachusetts and elsewhere. *Evans v. Bacon*, 99 Mass. 213.

The demurrer to the bill is sustained.

TREAT, D. J., concurs.

TANNER v. DUNDEE LAND INVESTMENT Co. and another.

(Circuit Court, D. Oregon. July 5, 1882.)

1. INTEREST ON NOTE.

Where a note is made payable at a future day, "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect.

2. SPECIFIC PERFORMANCE.

A contract to convey real property will be specifically enforced as prayed for by the plaintiff, where its terms are admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract as to the part to be performed by the plaintiff, which in the judgment of the court is unsupported by the language of the contract or the circumstances of the case.

Suit in Equity for Specific Performance.

The plaintiff, *pro se*.

Ellis G. Hughes, for the defendants.

DEADY, D. J. This suit was commenced in the state circuit court for this county and removed here by the defendants, one of whom is a British corporation and the other a British subject. It is brought to enforce the specific performance of a contract for the sale and conveyance of real property, and was heard on bill and answer.

It is alleged in the bill that the defendant the Dundee Land Investment Company, on July 15, 1881, was the owner of certain real property bounded as therein described, without stating the quantity, and situate in King's addition to Portland, and on the same day its manager, the defendant William Reid, entered into a written contract with the plaintiff, in which he acknowledged the receipt of

\$400 from the plaintiff as a part of the purchase price of \$2,500 for said real property, then occupied by the plaintiff as a residence, and also thereby agreed that he would within 60 days cause to be made and delivered to the plaintiff a warranty deed to the premises from his co-defendant. The agreement is signed by William Reid, but not the plaintiff, and in addition to the foregoing contains the following condition or stipulation:

"It is also understood and agreed that the balance due upon said purchase price, to-wit, the sum of \$2,100, shall be paid in 20 notes of \$105 each, payable one every six months, with interest at 10 per centum per annum upon each of said 20 notes of \$105 each from their date; that is to say, the first of said notes shall become due and payable six months after the date thereof, and the second one year after the date thereof, and so on with the rest, and said notes shall be secured by a mortgage upon said property, to be made, executed, and delivered at the same time said deed is delivered."

That within the 60 days the deed aforesaid was duly executed and delivered to the defendant Reid for the plaintiff, who still has the same in his possession, but refuses to deliver it to the plaintiff; and that the plaintiff is still in the possession of the property, and has been and still is ready and willing to perform his part of said contract.

The answer of the defendants admits the allegations of the bill, except as to the offer of the plaintiff to perform and the refusal of the defendant to do so, and alleges the fact to be that the defendants have been and are ready to deliver the deed to the plaintiff as provided in the contract, but that he refused and still refuses to make and deliver his 20 promissory notes as aforesaid, payable one each six months from the date thereof, with interest at 10 per centum per annum, and the interest then accrued upon the whole of said sum of \$2,100, or so much thereof as may remain unpaid.

On the argument the plaintiff admitted that by the terms of the sale he was bound to give his 20 notes for the balance of the purchase money, \$2,100, payable one every six months, with the interest thereon from date; but the counsel for the defendants insisted that he was also bound thereby to undertake and promise, in or by said notes, that upon the payment of each of them he would also pay the interest then accrued and unpaid on all the rest of them; and whether he is so bound or not is the only question in the case.

No authorities have been cited by either party, and none will be referred to by the court.

It is too plain for argument that no interest is due on a promissory note payable at a future day, "with interest" at a certain rate per annum, until the principal sum is due. The promise to pay the interest is to pay it *with* the principal at the time the latter becomes due; and if the payee or holder of a note claims that interest is due and payable thereon during the period the note has to run, he must show some special provision or agreement to that effect before his claim can be allowed.

The only matter in this agreement or terms of sale upon which the defendants base their claim for notes with interest thereon, payable semi-annually, are the words, "upon each of said 20 notes of \$105," as they occur in the clause declaring that the \$2,100 shall be paid in 20 notes, "payable one every six months, with interest at 10 per centum per annum *upon each of said 20 notes* of \$105 each from their date." But these words, "upon each of said 20 notes," are used in this connection merely to emphasize the idea already expressed, that each of said notes was to bear interest; and this is made still more apparent by what follows, "each from their date;" that is, each of these notes is to bear interest at the prescribed rate from its date. The words in this sentence, "each from their date," have just as much significance as the ones "upon each of said 20 notes." Strictly speaking they are both superfluous, for it was already provided that the \$2,100 should be paid in 20 notes, payable one every six months, with interest at a prescribed rate, which could only mean that each note should bear such interest at and from its date. But if the plaintiff is bound by this clause to undertake to pay the interest on all the unpaid notes every six months, as one of them becomes due and payable, then he must agree to do so on each of them, not from the date of the last payment, but "from their date," which would require him to pay the first six months' interest on the last note 19 times over, and so on. But the agreement itself resolves this matter very clearly under a *videlicet* in the following clause: "The first of said notes shall become due and payable six months after date thereof, and the second one year after the date thereof, and so on with the rest;" the plain purport of which is that the principal and interest on each note were to become due and payable at once and together, and neither of them in instalments.

It may be that it was the intention of the defendant Reid, or that it was in his mind, that the interest on this sum, or the instalments of it which remained due from time to time, should be paid semi-

annually; but as he omitted to insert any provision to that effect in the terms of sale, he cannot now insist upon the delivery of notes to that effect as a precondition to the delivery of the deed.

A court of equity will decree a specific performance of a contract respecting real property where: (1) the contract is in writing; (2) is certain and fair in all its parts; (3) is for an adequate consideration; and (4) is capable of being performed. 2 Story, Eq. Jur. § 751.

There is no allegation in the answer of the defendants tending to show that the notes which the plaintiff offers to give, and the contract appears to require, were not an adequate consideration for the premises at the date of the sale, nor that any advantage was taken of the defendants in the sale, or any mistake made in reducing its terms to writing. The only objection made in the answer to a specific performance of the contract as prayed for by the plaintiff is that the plaintiff has not offered to perform it according to the construction which the defendants now seek to have put upon the terms of sale,—a construction which, it appears to the court, is altogether unsupported by the language of the writing or the circumstances of the case.

If there was a serious doubt about the terms of payment, the court would refuse to enforce the contract against the defendants' construction of it; but where there is no room for such doubt, the contract must be enforced notwithstanding the defendants' objection.

The decree of the court will be that the defendant Reid deliver the deed of the defendant the Dundee Land Investment Company to the plaintiff within 10 days, and upon the delivery to him of the notes and mortgage for the \$2,100, as provided in the terms of sale, according to the judgment of this court, and that the plaintiff recover his costs.

BYBEE v. HAWKETT and others.

(Circuit Court, D. Oregon. July 1, 1882.)

I. PARTNERSHIP—MINING COMPANY.

A contract between three persons to operate a "mining property as a company" creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of said enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties until two of them are reimbursed therefrom the money expended in the purchase of two-thirds of the property from the other one, and the cost of improving the same.

2. MORTGAGE.

The mortgagee of a mortgage to secure an antecedent debt is not regarded as a purchaser, and therefore the lien of his mortgage will be postponed to that of a prior but unrecorded one.

3. SUIT TO ENFORCE THE LIEN OF A MORTGAGE.

In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, cannot set up a claim or have a decree against the plaintiff for the amount of his debt upon the ground that the plaintiff is personally liable to him therefor as partner of his mortgagor.

4. PARTNERSHIP WITH A MEMBER OF ANOTHER PARTNERSHIP.

Although A. may be interested with B. in his interest in a partnership, consisting of B. and two others, that does not make him a member of said last-mentioned partnership.

In Equity.

B. F. Dowell and Walter W. Thayer, for plaintiff.

E. C. Bronaugh, for defendants Robinson and Magruder.

DEADY, D. J. This case was before the court (6 Sawy. 593) on a motion of the plaintiff to remand it to the state circuit court for the county of Jackson, where it was commenced on June 18, 1879, and the statement of the case there made is now referred to. Afterwards, on May 2, 1881, exceptions for impertinence were allowed to certain portions of the "reformed bill," including those relating to the Irwin note for \$1,328.33, (erroneously printed in 6 Sawy. as \$3,128.33,) the note to Kubli and Bolt for \$85.43 signed by the plaintiff, and the \$86.24 due from Irwin to the plaintiff.

The cause is now argued and submitted on the pleadings, including the answers of the defendants Jesse Robinson, E. C. Robinson, John L. Robinson, and C. Magruder for himself and partner, Benjamin Haymond, and the testimony and exhibits; the defendants A. W. Hawckett, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley, A. A. Fink, and Thomas Robinson having failed to answer.

It appears that on October, 13, 1877, James Neely, as administrator of the estate of Evan Taylor, deceased, sold to the plaintiff, William Bybee, a certain mining property known as "the Taylor claims," situate in Josephine county, Oregon, and described as lot 5 in section 35, of township 35 S., range 7 W., and two water rights and ditches approximate thereto, for the sum of \$3,100, there being an agreement at the time between said Bybee and William Smith and William Irwin that the latter should each be entitled to a conveyance of an undivided one-third of the property upon the payment to Bybee of one-third of the cost thereof, and that in the mean time they would work the mine together, which they did for about six months.

On March 1, 1878, Bybee bought out Smith for \$500, and gave him his note for the amount, payable in two years.

On July 26, 1878, Neely, by order of the proper court and in pursuance of the sale aforesaid, conveyed the premises to Bybee, who on the same day sold and conveyed an undivided two-thirds thereof to the defendants A. W. Hawkett and E. C. Robinson; and on the same day, and as a part of the transaction, said Bybee entered into a written agreement with said Hawkett and Robinson in the words and to the effect following:

"That whereas, the party of the first part [Bybee] has sold to the parties of the second part [Hawkett and Robinson] the undivided two-thirds of certain mining property in Josephine county, Oregon, known as the Taylor claims, and said parties agree to mine and operate said mining property as a company, and as a consideration for said two-thirds interest the said parties of the second part are to pay certain debts; it is therefore agreed as follows: That said parties of the second part agree to pay and assume \$6,098.24 in the following debts, to-wit: To James Neely, administrator of Evan Taylor's estate, \$2,784.56; Kaspar Kubli, \$882.68; Daniel Green, \$500; William Smith, \$500; and agree to pay to William Bybee, \$1,432. The said amounts to be paid down, or arranged upon such time as may be agreed on between the parties of the second part and the persons to whom said debts are due."

The agreement then further provided:

(1) That the "parties of the second part agree to put on said claims, at their own expense, such improvements and additional machinery as may be necessary;" (2) that all the "amounts above mentioned, and also the cost of any additional improvements which may be put onto said claims, are to be repaid to said parties of the second part out of the profits taken out of said mines when the same shall be taken out, and before any dividends shall be made to the members of said company;" (3) that the profits of said mines, after repaying the amount of said debts and the cost of said improvements, "shall be equally divided between the then members of said company, aforesaid;" and (4) that said property and "the improvements which shall be hereafter put on said claims are to be held as a lien and security for the payment of the debts above specified."

This agreement was executed at Jacksonville, Oregon, by Hawkett, for himself and E. C. Robinson, who was then at Oakland, California, living with his father, the defendant Jesse Robinson. The defendant C. Magruder was also present, and paid out for E. C. Robinson, upon the purchase of the property, to Neely, \$2,784.56, the balance due from Bybee to the administrator on the sale of the property to him in October, 1877; to Bybee, \$432; to Kasper Kubli a check upon E. C. Robinson for \$500, which was duly paid. At the same time that Hawkett and Robinson purchased from Bybee, it was arranged

to buy out Irwin's equity for \$2,500, which was paid as follows: \$500 by Hawkett in cash, furnished by E. C. Robinson; by receipt for \$500 due Magruder from Irwin on account; and by the undertaking of Hawkett and Bybee to pay \$85.43 due said Kubli from Irwin, and of Hawkett to pay \$86.24 due from Irwin to Bybee. For the balance of the sum due Bybee, Hawkett, for himself and Robinson, gave a promissory note for \$1,000, payable to the order of Bybee one day after date, with interest at 1 per centum per month, and for the balance due Kubli they gave a similar note for \$382.68, with Bybee as surety. Nothing has been paid on these notes by Hawkett or Robinson, nor upon the sums due Green and Smith; as aforesaid. The sums due Green and Smith have since been paid by Bybee, and on December 2, 1879, Kubli obtained a judgment for \$489.15 on the note given him for \$382.68, which Bybee satisfied on July 6, 1881.

Hawkett and E. C. Robinson commenced operations on the mine in September, 1878, digging a ditch of some length, and putting up a giant and pipe furnished by Jesse Robinson, from California. About the first of January they commenced to work the mine, and in that month Jesse Robinson visited the mine and remained there until the following spring, giving more or less direction to its management. The mine did not prove remunerative, and Hawkett, who had put his skill and services as a miner into the venture against Robinson's money, on March 17, 1879, withdrew from the company and conveyed his third of the property to E. C. Robinson for the nominal consideration of \$5,000.

On May 13, 1879, E. C. Robinson mortgaged the undivided two-thirds of the premises to the defendants Magruder and Haymond, to secure the payment of his note of the same date, made payable to said defendants 30 days after date, for the sum of \$2,295, with interest at the rate of 1 per centum per month; which mortgage was duly recorded on May 15, 1879. On May 14, 1879, E. C. Robinson again mortgaged the same interest in the premises to the defendant Jesse Robinson, to secure the payment of his note of the same date, made payable to said defendants 30 days after date, for the sum of \$4,975, with interest at the rate of 1 per centum per month; which mortgage was duly recorded on the same day; and on July 16, 1879, said Jesse Robinson assigned said last-mentioned note and mortgage to his brother, the defendant John L. Robinson, of Tioga county, Pennsylvania, for the sum of \$4,300.

This suit has now diminished to a proceeding to enforce the agreement of July 26, 1878, including the lien provided therein as a se-

curity for the payment of the debts therein specified. There is also an allegation left in the bill that the Robinsons did not truly account for the gold dust taken out of the mine, and a prayer for an account. The answers of the defendants E. C. and Jesse Robinson state that only \$2,800 was taken out up to the commencement of this suit, when the mine passed into the hands of a receiver, where it has since remained, all of which and much more was expended in improving and working the mine; and whatever the fact may be, the evidence to the contrary is vague, trifling, and scarcely worthy of consideration.

The agreement of July 26, 1878, is practically a personal obligation of Hawkett and E. C. Robinson, and also Jesse Robinson, if he was a partner with them in the purchase of the mine, as the plaintiff alleges, to pay the debts therein specified, and also a mortgage of the property to secure such payment. The personal liability of E. C. Robinson and Hawkett, in case the property is not sufficient to pay the debts, is admitted; but that of Jesse Robinson depends upon the fact whether or not he was a partner with Hawkett and E. C. Robinson in the purchase on July 26, 1878. He was not known in the transaction as such. Bybee did not give him credit or part with anything upon the faith of his being responsible for it as a partner or otherwise. But he now alleges that Jesse Robinson was a secret partner in the purchase, and the burden of proof is upon him to establish the fact, before he can hold him responsible as such.

The evidence upon this point is conflicting, and largely made up of admissions by members of the company to the effect that J. Robinson was a partner, which are clearly inadmissible for that purpose, (1 Greenl. Ev. § 177,) and the casual and indefinite conversations and remarks of J. Robinson concerning the management and prospect of the business while he was at the mine, which might have proceeded from the fact that he was interested as a partner, or as the father of E. C. Robinson, and the principal creditor of the company. Hawkett is the only witness that testifies that J. Robinson ever said he was a partner in the purchase of the mine, and his statement is to the effect that J. Robinson was the real party in interest, but that he did not want to be known in the matter. But his credibility is affected somewhat by the fact that he may be now trying to shift the responsibility of a losing adventure undertaken upon his judgment and recommendation, and is very much affected by the further fact that on May 11, 1879, he deliberately wrote to a person seeking to collect one of the debts specified in the agreement of July 26,

1878, that J. Robinson had no interest in the matter, except that he had loaned him and E. C. Robinson money to open the mine with.

Both E. C. Robinson and J. Robinson deny in their answers that the latter was a partner in the purchase or working of the mine, and the evidence of the plaintiff is not sufficient to establish the partnership against these denials, if at all. It may be and probably is true that there was some private agreement or understanding between the father and the son by which the former was interested with the latter in this adventure, and that so far they sustained to one another the relation of partners instead of that of debtor and creditor, but that would not make J. Robinson a partner of the firm of Hawkett and E. C. Robinson, or Hawkett, Robinson, and Bybee. No one can become a member of firm without the knowledge and consent of all the partners. Collyer, Part. 5.

The agreement of July 26, 1878, was not recorded until May 30, 1879, and subsequent to the execution and record of the mortgages to Magruder and Haymond and Jesse Robinson, but before the assignment of the latter to John L. Robinson. But both these mortgages and this assignment were made in consideration of previous indebtedness, and therefore the mortgagees and assignees are not entitled to be regarded as purchasers. Besides, such mortgagees must be held upon the proof to have had actual knowledge of the lien provided for in the agreement of July 26th, and therefore took their mortgages in subordination thereto, irrespective of the question of priority of record. The assignee had constructive notice of this lien also when he took his assignment, as the agreement had then been admitted to record. Jones, Mortg. § 458 and note.

These conclusions are admitted by counsel for the defendants E. C. Robinson and J. Robinson, but he also claims that Bybee was a partner in the working of this mine from the date and by virtue of the agreement of July 26th, and that so much of the debt due Magruder and Hawkett as arose from the furnishing of supplies to the company, Bybee, as a member thereof, is personally liable for, and therefore his lien upon this property or the proceeds of it ought to be subject in this suit to the satisfaction of this claim. It is admitted that the debt for which the mortgage was given to J. Robinson is not a demand against the company, it being wholly for money and material furnished Hawkett and E. C. Robinson to enable them to open and improve the mine as per their agreement with Bybee. It is also admitted that \$500 of the debt for which the mortgage was given to

Magruder and Hawkett is not a demand against the company, it being the sum advanced by Magruder to Irwin for E. C. Robinson on the purchase of his interest in the mine, the advance being made by the settlement of an account of that amount which Irwin owed Magruder. The remaining \$1,795 of this debt, it is claimed by Magruder in his answer, was due from "Hawkett and E. C. Robinson," or "the company mentioned in said agreement of July 26th," "for goods, provisions, etc., furnished to said company, and for freighting done by said firm of Magruder & Hawkett for said firm or company of the Josephine mine" prior to May 13, 1879.

This is indefinite as to whether the goods and freighting were furnished to Hawkett and Robinson while opening the mine, or to Bybee, Hawkett, and Robinson while operating it. In the first case Bybee would not be liable under any circumstances. No testimony has been offered on the subject except the answer of Magruder, and that is not satisfactory. In the nature of things these supplies and this freighting would be furnished to improve the mine as well as to operate it. The burden of proof is, I think, upon Magruder and Hawkett to show that these things were furnished to a company of which Bybee was a member. Besides, the fact that he settled with E. C. Robinson, who then represented Hawkett as well as himself, and took his individual note for the amount, and a mortgage upon his individual interest in the mine as security, without paying any attention to Bybee, or his interest, is a circumstance tending to show that Magruder did not then regard the debt as due from Bybee.

On the other hand, counsel for the plaintiff insist that Bybee was not, by the terms of the agreement of July 26th, to become a partner with Hawkett and Robinson until the proceeds of the mine had reimbursed them for the money expended in its purchase and improvement, which, it is admitted, it never did.

In my judgment the agreement created a partnership from its date, consisting of Hawkett, Robinson, and Bybee, for the purpose of operating the mine, and that, whenever it was operated by any or either of them, they all became liable for the debts thereby incurred; and the fact that a division of profits between the partners was postponed until the money advanced by Hawkett and Robinson for the purchase of a two-thirds interest, and the improvement of the whole of it, does not affect the unqualified agreement of the parties in words of the present tense,—“to mine and operate said mining property as a company.”

In *Beauregard v. Case*, 91 U. S. 134, a question of partnership arose under very similar circumstances. In the course of the opinion of the court delivered by Mr. Justice Field it is said:

"There was in this agreement all the essential conditions for the creation of a partnership—provision for a union of services and money, and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business."

But admitting the partnership, and assuming that this debt is a valid demand against the firm, and that therefore Bybee is liable therefor, I do not see how Magruder and Hawkett can set up their claim in this suit.

So far as Bybee is concerned this is a suit to enforce the agreement of July 26th as a personal contract against Hawkett and E. C. Robinson, and as a mortgage against the property. Magruder and Hawkett are not parties to it, nor have they any rights in it except by reason of the lien of their mortgage, and that to have their mortgage adjudged valid and assigned its proper place in the order of time and payment. But it is admitted that it is subsequent in point of time to that of the plaintiff's, and that its payment out of the proceeds of this property as a debt secured by a lien thereon must be deferred until that is satisfied. But the defendants have no standing in this suit or right in this property except as mortgagees, and that is subordinate to the plaintiff's. This is not a suit to recover anything from the defendants Magruder and Hawkett, and in which they can therefore plead a counter-claim or set-off. Neither can they, if they would, convert their answer into a species of cross-bill and subject the sum which the plaintiff may obtain in this suit to enforce his mortgage against the property in question to the satisfaction of an independent personal claim which they may have against him. If they wish to enforce such a claim against him as a member of the partnership created by the agreement of July 26th, the courts are open to them to bring their action against him for that purpose.

The plaintiff paid the balance of the debt to Kubli of \$382.68 as follows: He signed the note of Hawkett and Robinson, therefore, as surety, drawing interest at 1 per centum per month, upon which Kubli obtained judgment, which the plaintiff paid; and he now seeks to recover what he paid on that judgment, including the inter-

est, costs, and attorney fee, rather than the original amount, with legal interest.

But the liability of Hawkett and E. C. Robinson arises upon the agreement of July 26th, which is to pay the debt specified therein, with such interest as the law will allow thereon, none being agreed upon, and the costs properly chargeable against them in this suit for its collection. Whether the plaintiff has gained or lost in his contract as surety, or in the acquisition of these claims, is nothing to the defendants. As has been said, their liability in this suit is measured by the agreement of July 26th.

The plaintiff, on his own account and as the representative of the other creditors mentioned in said agreement, has the first lien upon this property for the sum of \$2,382.68, the aggregate sum of said claims, with interest thereon at the legal rate, to-wit, 10 per centum per annum, from July 26, 1878, to January 25, 1880, a period of one year and six months, and at 8 per centum from then to July 1, 1882, making in all the sum of \$3,118.36, together with the costs and expenses of this suit, except as to the defendants against whom the bill is dismissed.

The defendants Magruder and Hawkett have the second lien upon the undivided two-thirds of the property for the full amount of their note and mortgage, with interest as therein provided, and the costs of their defence.

The defendant John L. Robinson, as the assignee of Jesse Robinson, has the third lien upon said undivided two-thirds of said property for the full amount of his note and mortgage, with interest as therein provided, and the costs of his defence.

The decree of the court will be that the bill be dismissed as to the defendants who are not liable to the plaintiff in this suit, and have no interest in the subject of it, namely, Jesse Robinson, Thomas Robinson, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley, and A. A. Fink, and that they, and each of them, recover costs from the plaintiff; that the master of this court sell this property as upon an execution at law, and apply the proceeds, after paying the costs and expenses of the sale, upon the claims aforesaid in the order specified.

MOLINE WAGON Co. v. RUMMELL and others.

(Circuit Court, W. D. Missouri, W. D. October, 1880.)

1. PARTNERSHIP—PRESUMPTION OF CONTINUANCE.

Persons or corporations dealing with a partnership once existing have a right to presume that the persons once composing the firm continue doing business in the firm name, and that the firm continues to exist; and nothing short of public or personal notice that the firm has been dissolved, will relieve the parties of their liability as partners.

2. SAME—MORTGAGE TO SECURE INDIVIDUAL DEBT.

Where a partnership is still in existence one partner cannot mortgage the stock under his control to secure his individual debt.

3. SAME—WHEN FRAUDULENT.

Where the object of the mortgage was to prevent, hinder, or delay creditors in the collection of their claims, such mortgage is fraudulent.

KREKEL, D. J., (*charging jury*.) The Moline Wagon Company, on the eighth day of January, 1880, instituted suit in the Putnam county circuit court of this state against Rummell & Cutler, claiming that these two defendants constituted the firm of Rummell & Son. The suit is on four notes and on an account, all given and made in the years 1879 and 1880, and amounting in the aggregate to near \$7,000. The suit came here by removal under various acts of congress authorizing non-residents to bring or remove their suits into the federal courts. In aid of their suit plaintiffs made affidavit alleging that they had good reason to believe, and did believe, that the defendants had fraudulently conveyed and assigned their property or effects so as to hinder and delay their creditors. One of the defendants, Jacob Rummell, files a plea in abatement denying the allegations of the affidavit, and the plaintiff is thereupon held to prove the existence of the facts sworn to by him. The plaintiff, the Moline Wagon Company, undertakes to establish the truth of the allegations and present their claim against Rummell & Cutler, claiming that they composed the firm of Rummell & Son, to whom the property was sold, and who obtained credit. Cutler, by failing to appear and deny the allegations in the affidavit, confesses them. It is claimed by defendant Rummell that the debt is due from Cutler alone; that the property was sold to him; and that he (Cutler) alone is responsible. If you shall find from the testimony that the property was sold by the Moline Wagon Company to Cutler alone, and not to the firm of Rummell & Son, you should find the issue for the defendant Rummell; for, unless the firm existed, the Moline Wagon Company cannot attack any of

Rummell's acts or intentions in making the mortgage. It is only upon the supposition that Rummell is liable with Cutler for the debt to the Moline Wagon Company that it has the right to inquire into the acts and doings of Rummell in dealing with what he claims to be his property. The question of the existence or non-existence of the partnership is therefore a material question.

It is not disputed that up to 1878 a partnership between Rummell & Cutler did exist; that that partnership dealt in general merchandise, including wagons, and that dealings were had between the plaintiff corporation, the Moline Wagon Company, and the firm of Rummell & Son. It is also an undisputed fact that the firm of Rummell & Son, composed of Rummell & Cutler, were equal partners up to 1878. Persons or corporations dealing with a partnership once existing have a right to presume, and the law will presume, that the persons once composing the firm continue doing business in the firm name, the firm continues to exist, and nothing short of public or personal notice that the firm has been dissolved will relieve the parties of their liability as partners. No agreement or understanding between the partners, no division of their business, can relieve either of his legal liability as to creditors who extend credit to the firm. Nor are creditors who extend credit to a firm bound to regard public rumors, even if they heard of them, if the partners continue to use the partnership name and avail themselves of the partnership credit and accept such credit. You are therefore instructed that if you shall find from the evidence that a partnership between Rummell & Cutler existed up to 1878; that thereafter, and up to the time of the creation of the debts sued on by the Moline Wagon Company, the partners of such firm continued to obtain and receive credit in the firm name, either or both of the partners are liable for the debts thus created, unless public notice of the dissolution of the partnership, or the notice of dissolution, is brought to the notice of the Moline Wagon Company. If, under this view of the law, you shall find from the evidence that plaintiff, the Moline Wagon Company, gave credit to the firm of Rummell & Son, composed of Rummell & Cutler, and the firm existed, it is liable for the debt thus contracted.

All the assets of the partnership, both merchandise, notes, and accounts, as well as all wages and property of the partnership which Cutler may have handled in his division of the partnership, as well as all notes and accounts which Cutler may have taken, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership. If you shall

find from the evidence that a partnership, under the instructions given you, existed between Rummell & Cutler at the time of the execution of the mortgage by Rummell, then (for the purposes of this case) Rummell could not use the partnership assets for payment of individual debts which Rummell may have created, and the mortgage is a fraud upon the partnership creditors.

In order to arrive at the intention of Rummell in making the mortgage your attention is directed to the mortgage itself. By its terms it is a conveyance of "the entire stock of merchandise of Jacob Rummell, * * * and all the notes and accounts of said Rummell due or to become due." Now the stock of merchandise might be seen, but no one looking at the mortgage could tell the notes and accounts conveyed. You are to arrive at a conclusion as to what object Rummell could have had in view in thus keeping out of the mortgage the amount of the notes, which must have been known to him. Again, you will determine from the evidence what was the object of Rummell in making the \$1,500 note to Huiscamp when he could have named the Keokuk creditors as well as all others in the mortgage, which, if done, would in all probability have disclosed the claimed mistake of \$900 in the sum (\$1,500) assumed to be due the Keokuk creditors. Had Rummell any object in placing these creditors under the care of Huiscamp, as was done, and what was that object? Your attention is also directed to the amount of debts which Rummell claims to have had at the time he made the mortgage. After ascertaining this amount you will further see what amount of property he had. If, by comparing the amount of indebtedness with the amount of property which he owned, you shall find that the indebtedness was not as large as the amount of property, you will have to determine what intention Rummell could have had in making the conveyance. You will recall the arrangement between Huiscamp and Rummell agreeing to delay the execution of the mortgage until something occurred making the execution of the mortgage desirable. Regarding the acts of Rummell and Huiscamp in dealing with the stock of goods, notes, and accounts, after the mortgage was executed, you are instructed that while the acts of the parties do not authorize the court to declare the mortgage void as a matter of law, yet you should closely look into what they did, and especially the act of Huiscamp in selling goods at retail when the mortgage provided for a public sale. Thus you may arrive at the intention of the parties by their acts. You will determine from the evidence whether the release of the notes from the mortgage was an after-thought, and

whether thereby, and the distribution of the notes among the creditors, Rummell intended to cover up and give color to a transaction not originally intended.

The large amount of property conveyed by the mortgage to secure a comparatively small debt is not itself a fraud; but such an act of conveying all his stock in trade, in face of the indisputable fact that he had sufficient notes and accounts by which he could have secured Huiscomp without making the mortgage, deserves your closest scrutiny for the purpose of arriving at the intention of Rummell in making the mortgage. If the mortgage was made by Rummell to prevent, hinder, or delay the creditors of Rummell & Son from collecting their debts, you should find the issue for the plaintiff. It was not for Rummell to determine that the firm of Rummell & Son did not owe the Moline Wagon Company, and therefore take steps to prevent, hinder, and delay them in the collection of their debt, if they had any against the firm; and if you shall find from the evidence that the object of the mortgage was to prevent, hinder, or delay them in the collection of any claim they might have against the firm, the law declares such acts fraudulent. In this case you may well see whether the maxim "acts speak louder than words" applies. As a matter of course, the explanation given by the parties of and about their acts is to be considered by you in the examination of the testimony. With the troubles between the partners we have nothing whatever to do; and such testimony in relation thereto as was allowed to be given was for the purpose only that you might be the better able to judge of the weight to be given to the testimony of Rummell and Cutler.

PATRICK v. LEACH.

(Circuit Court, D. Nebraska. June, 1881.)

ATTORNEY'S LIEN.

Under the statutes of Nebraska an attorney has no lien on the judgment obtained by him, in favor of his client, which he can enforce against a third party; and to secure the lien given on the papers of his client in his possession, or upon the money in his hands belonging to his client, or upon money in the hands of a third party, in an action or proceeding in which he was employed, as given by the statute, he must give personal notice in writing.

John C. Cowan and John D. Howe, for petitioners.
J. M. Woolworth, contra.

MCCRARY, C. J. It seems to me doubtful whether the statute of Nebraska relied upon by the petitioners applies to the case in hand. That statute is as follows:

"An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party."

The petitioners are attorneys at law, and claim a lien upon a certain judgment obtained by them in one of the courts of the state of Nebraska against the plaintiff herein.

It will be seen that the above-quoted statute gives an attorney a lien upon—*First*, "any papers of his client which have come into his possession in the course of his professional employment;" *second*, "upon money in his hands belonging to his client;" and, *third*, "upon money in the hands of an adverse party in an action or proceeding in which the attorney was employed."

Of course, a judgment obtained by the attorney cannot be said to be a paper of his client which has come into his possession, nor money in his hands belonging to his client. Is it money "in the hands of an adverse party in an action or proceeding in which the attorney was employed?" I think not. It is a judgment; that is to say, the judicial determination upon the issues of law and fact, of a court of competent jurisdiction, that a sum of money is due from the defendant to the plaintiff. This is not money in the hands of the defendant. A judgment creditor may have the right to seize upon execution any money in the hands of his judgment debtor, but this does not make it the money of such creditor before seizure. If petitioners have no lien under the statute they have no lien at all, for it is well settled that at common law an attorney has no lien for his disbursements or fees upon a judgment obtained by him. *Baker v. Crook*, 11 Mass. 235; *Hill v. Brinkley*, 10 Ind. 102.

In some of the states—as, for example, in Iowa—there are statutes giving the attorney a lien upon the money due his client from the adverse party in the litigation, but the statute of Nebraska above quoted contains no words which can be construed as giving such a lien.

If, however, I am wrong upon this proposition, I am very clearly of the opinion that no lien has been established in this case, for the reason that no sufficient notice was given under the provisions of the

statute, assuming that it was applicable. The notice provided for is undoubtedly personal notice, and I think very clearly it should be in writing. This would be so upon general principles, and I think also under the provisions of section 627 of the General Statutes of Nebraska, which provides that "the service of a notice shall be made as is required by law for the service of a summons."

For these reasons I am constrained to hold that the petitioners have no lien upon the judgment mentioned in the pleadings, and that their application to be made parties must be overruled.

See *In re Wilson & Greig*, ante, 235.

ALLEGHENY NAT. BANK OF PITTSBURGH v. HAYS.

(Circuit Court, W. D. Pennsylvania. July 15, 1882.)

1. WILL—LEGACIES—CHARGE ON REALTY.

Where the share in real estate devised to defendant was expressly subjected by the will to the payment of capital in a firm, the administrator *cum testamento annexo* is entitled to the fund arising from the sale of such share.

2. SAME—RESIDUARY CLAUSE.

Where a testator, without creating an express trust to pay legacies, makes a general residuary disposition of his whole estate, blending the realty and personalty in one fund, the real estate is constructively charged with the legacies.

3. SAME—RIGHTS OF LEGATEES.

Where the real estate of decedent, charged with payment of the legacies, had been partitioned among the devisees, the legatees not being parties to the partition, and never acceding to any apportionment of the legacies, they are not estopped from asserting their paramount lien against a fund arising from a judicial sale of a portion of the realty.

Sur exceptions to auditor's report distributing the proceeds of execution.

Geo. Shiras, Jr., for exceptants.

John Dalzell and S. A. McClung, for report.

ACHESON, D. J. The fund for distribution arises from the sale of real estate sold by the marshal as the property of William B. Hays, Jr., under a *lev. fa.* upon a judgment *sur* mortgage given by the defendant to the plaintiff. The property is part of the residuary estate devised by the will of William B. Hays, Sr., deceased, to his five children, of whom the defendant is one. Curtis, another son and devisee, conveyed his share to the defendant, and the parties subse-

quently caused partition to be made among themselves. The property sold consists of the two shares assigned to the defendant—one in his own right as devisee, and the other in his right as alienee of Curtis.

It is claimed, on the one hand, that the fund should be applied to the plaintiff's mortgage, and to a purchase-money mortgage which the defendant gave Curtis, and which, by assignment, came to one McIntyre; and on the other hand the fund is claimed by the administrator *d. b. e. cum testamento annexo* of William B. Hays, Sr., and legatees under the will. The auditor, who sustained the latter claims, seems to have given the case a very careful consideration. I approve his findings of fact, and am of opinion that his distribution proceeds on sound legal principles.

1. In treating the amount of the testator's capital in the firm of William B. Hays & Co. as a lien upon the share of the real estate devised to the defendant, and as discharged by the marshal's sale, the auditor was clearly right. *Hanna's Appeal*, 31 Pa. St. 53. The share devised to the defendant was expressly subjected by the will to the payment of that capital, and the auditor properly sustained the claim of the administrator *cum testamento annexo* to the fund realized by the sale of that share.

2. The legacies under the will of William B. Hays, Sr., undoubtedly come within the well-settled rule that where a testator, without creating an express trust to pay legacies, makes a general residuary disposition of his whole estate, blending the realty and personalty together in one fund, the real estate is constructively charged with the legacies. *Hill, Trustees*, 860; *Lewis v. Darling*, 16 How. 1. This principle was adopted as a rule of property in Pennsylvania at a very early day, (*Nichols v. Postlethwaite*, 2 Dall. 131,) and has constantly prevailed, as is shown by the cases cited in the auditor's report. The fact that the testator expressly charged the amount of his capital in the firm of William B. Hays & Co. upon the share of the realty devised to the defendant, does not interfere with the implication arising from blending the real and personal estates in the residuary clause, or indicate any intention not to charge the legacies upon the real estate. *McLanahan v. Wyant*, 1 Pen. & W. 112.

3. But the auditor having found that the personal estate which came into the hands of the executor was sufficient to pay all the debts and expenses of administration and the legacies, it is insisted that he erred in holding that the lien of the legacies upon the real estate nevertheless continued. To sustain the contrary doctrine the except-

ants rely upon *Hanna's Appeal*, *supra*, and *Kohler's Appeal*, 3 Grant, 143. In those cases it is indeed said that "when assets are received by the executor sufficient to cover the expenses of administration, satisfy debts, and pay legacies, the real estate is discharged from further liability," and "if the assets are wasted or misapplied, the loss falls on the legatees;" that "the real estate charged is liable on a deficiency of assets, but not for the misapplication, waste, or insolvency of the executor." There, however, the court undoubtedly spoke in respect to a case where the personal estate is the primary fund to pay legacies, and the charge upon the real estate is merely subsidiary. But we have no such distinction here. The personal estate is not the primary fund under this will. The testator, by blending the personalty and realty created a single fund charged with the payment of the legacies.

Hence, it was held in *Lewis v. Darling*, *supra*, that where a will, by its residuary blended the disposition of the realty and personalty, shows an intention to charge the real estate with the payment of a legacy,—it is not necessary to aver a deficiency of personal assets in a bill to enforce a lien against the real estate. The *Bank v. Donaldson*, 7 Watts & S. 410, distinctly decides that where the real and personal estates are thus blended together, though the testator may have left ample personalty to pay debts and legacies, yet, if not applied to the legacies, they remain a charge upon the real estate, and are entitled to payment out of the proceeds when sold on an execution against the residuary devisee. And to the like effect is *Gallagher's Appeal*, 48 Pa. St. 121.

I fail to see in the case any element of estoppel against the legatees. None of them were parties to any *devastavit* of the personal assets, nor did they do aught to mislead the exceptants. The rights of the latter certainly can rise no higher than the rights of Curtis H. Hays. Now, if the executors of William B. Hays (of whom the defendant was one) were trustees for the legatees, they were equally so for Curtis, who could have taken steps to secure the payment of the legacies in relief of the share devised to him. As the residuary devisees could take nothing except what might remain after payment of the legacies, the legatees could safely repose upon the ample security of the real estate. It may be added that most of the legatees were, and still are, minors.

4. The exceptants, however, contend that in no view of the case should the fund be charged with more than two-fifths of the legacies, the other shares of the testator's residuary estate being answer-

able for their proportions of this common burden. But the legatees were not parties to the partition of the real estate, and never acceded to any apportionment of the legacies. Without their consent part of the real estate, which is their security, has been converted into money by a judicial sale, and thereby their lien, which is paramount, has been transferred to the fund. Their legal right to the fund is complete, and neither the exceptants nor those under whom they claim have superior equities. *Neff's Appeal*, 9 Watts & S. 36; *Arna's Appeal*, 65 Pa. St. 72. To the payment of the legacies the fund must therefore go, and the exceptants must seek subrogation and indemnity in a different proceeding. *Id.* The other devisees are not before the court. We are not advised as to their equities, and cannot act in respect to them.

And now, July 15, 1882, the exceptions to the report of the auditor are overruled, and the distribution made by him is confirmed absolutely.

THOMAS and others v. ARMSTRONG and others.

(Circuit Court, W. D. Missouri, W. D. May Term, 1882.)

1. ESTATES OF DECEASED—DESCENT AND DISTRIBUTION.

Where a second wife recovered judgment against a railroad company for the death of her husband by its negligence, and invested the proceeds thereof for the benefit of her children and subsequently died, her heirs hold the estate in trust for themselves and the heirs of their father by a prior marriage, and the property or the proceeds thereof should be divided equally among the two sets of heirs.

2. SAME—RIGHTS OF HEIRS BY FIRST MARRIAGE.

Where heirs of a first marriage were in some way induced to believe that they were not entitled to any part of their money coming from their deceased father's estate until the youngest came of age, their delay until that time to assert their claims is not such laches as will deprive them of their rights.

In Equity.

French & Dunlap, for complainants.

Jenkins & Twitchell, for respondents.

KREKEL, D. J. The controversy in this case is between two sets of children of Michael Armstrong, who at the time of his death resided in the state of Pennsylvania. He was killed in that state by the Catawissa Railroad in 1862. Armstrong was married twice: first with Mary A. Armstrong, of which marriage there are three children, the present plaintiffs, and next with Margaret Armstrong, of which marriage there are also three children, the present defendants.

The laws of Pennsylvania in force at the time of the killing authorized the surviving widow to sue the railroad company for damages on account of the wrong, but required that the children of the deceased should be named in the declaration, and provided further that the money recovered should be divided by giving the widow one-third and the children the remainder in equal parts. Armstrong, the deceased, seems to have had so little property at the time of his death that no administration was had on his estate until long after his death, and then for the purpose of selling a small interest in a tract of land. The widow, Margaret Armstrong, sued the railroad company and recovered a judgment, which, after deducting attorney fees, costs and expenses, amounted to \$3,044.20, the whole of which was paid to her by her attorneys in 1866. At that time the complainants in this bill, the heirs by the first marriage, were minors, girls,—12, 14 and 16 years old,—all married now; and they and their husbands are prosecuting this suit. The widow, Margaret Armstrong, removed from Pennsylvania in 1872, and came to Kansas City, where she bought three lots in the west depot addition. One of these lots was sold under a deed of trust she had given. After living at Kansas City until 1876, she returned to Pennsylvania, and there died in that year. Her estate in Missouri has been administered, all the debts paid, and the two lots remaining of her purchase are in possession of defendants and claimed by them as her heirs.

The testimony in the case, with reasonable certainty, shows that the money she received from the railroad company on account of the death of her husband was used in the purchase and improvement of the property she owned in Kansas City, and the question is, shall it be subjected to lien to the extent of the claim of the children of the first marriage? That these children were entitled to one-half of the judgment recovered against the railroad company, after deducting one-third thereof, which came to her as widow, is not disputed, nor is it seriously questioned that the children of the first marriage were entitled to a share thereof. Laches is the plea by which their claim is sought to be defeated, and it is said that the probate court is the proper tribunal to adjudicate their rights. It may be true that the probate court in Missouri, having charge of her estate, might have allowed the claim of the complainants if presented, the consequence whereof would have been to sell and dispose of the remainder of her real estate, there being nothing else to satisfy such a claim. These defendants were certainly interested in not having the matter settled in that way, for it would have taken the whole of the estate. But it

is argued that complainants are barred on account of their laches. The testimony tends to show that the children of the first marriage were in some way induced to believe that they were not entitled to any part of their money until the youngest sister came of age. As soon as this happened they took steps to recover their dues. They were in Pennsylvania, the property in Missouri. They cannot well be told that their delay shall deprive them of their rights, provided they can show the property or the proceeds thereof, when by doing so they cannot possibly wrong anybody, unless it be a wrong to point out to their relations that what they supposed they were heirs to, others had an interest in. The statute of limitations presents no bar, nor are the claimants bound to resort to law to obtain their rights. Being satisfied from the evidence in the case that the proceeds of the railroad judgment went into and constituted the fund by which the property of Margaret Armstrong was bought and improved, the judgment and decree of the court will be that the real estate in controversy be declared trust estate, to be sold for the benefit of the children of the first and second marriage; that an account be taken of valuable and lasting improvements made by the defendants, or either of them; the payment of taxes, insurance, and the value of the rents since the defendants had possession thereof. On the coming in of the master's report the proceeds will be equally divided between the complainants and respondents.

EELLS and others, Adm'rs, v. HOLDER and others.

(*Circuit Court, D. Kansas. November, 1880.*)

1. EXECUTORS AND ADMINISTRATORS—SUITS BY.

In the absence of a statutory provision an administrator cannot sue outside of the state in which he is commissioned.

2. SAME—FOREIGN ADMINISTRATOR MAY COLLECT ASSETS.

Notes owned by deceased at the time of his death, secured by mortgages on lands in another state, are assets in the hands of his administrator appointed in the state where he resided at the time of his death, and his administrator may sue on them in the state where the land lies by which their payment is secured.

Pratt, Brumback & Ferry, for complainants.

G. C. Clemens, for respondent.

McCRARY, C. J. The complainants sue as administrators of the estate of Stillman Witte, who died intestate in the state of Ohio, in which state the complainants were appointed administrators.

The respondent demurs to the bill upon the ground that the complainants cannot sue in this state in virtue of a grant of administration in Ohio. In the absence of a statutory provision, it is clear that an administrator cannot sue outside of the state in which he is commissioned. *Dixon's Ex'rs v. Ramsey's Ex'rs*, 3 Cranch, 519; *Fenwick v. Sears*, 1 Cranch, 259; *Noonan v. Bradley*, 9 Wall. 394.

The statute of Kansas, however, provides as follows:

"An executor or administrator appointed in any other state or county may sue or be sued in any court in this state, in the capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued." Comp. Laws 1879, p. 436, § 2491.

The suit is upon notes secured by mortgage upon real estate situated within this district. The mortgagee and payee of the notes was a citizen of Ohio, and died there, while the mortgagor is a citizen of this state.

Counsel for respondent concedes that the statute authorizes a foreign administrator to sue in this state in certain cases, but insists that, according to the allegations of the bill, the complainants had no right to bring this particular action, because they did not by virtue of their appointment as administrators become the owners of the notes and mortgage sued on; that the title did not pass to them so as to enable them to sue and recover. This presents the question whether the notes and mortgage, being the property of Stillman Witte, a citizen of Ohio at the time of his death, passed as assets into the hands of his administrators in that state, the mortgage being upon Kansas land and the mortgagor and maker of the notes residing in the latter state. In other words, were the notes and mortgage assets of the estate of Witte in the state of Kansas or in the state of Ohio? The bill avers, and the demurrer admits, that at the time of the execution of the notes and mortgage the said Stillman Witte was a citizen of Ohio, and so continued until 1875, when he died intestate. It is now well settled that a mortgage given to secure a promissory note is a mere security and an incident to the note. Wherever the note is held and owned, there the mortgage follows. Can it be doubted that the notes sued on in this case were the property of Witte in Ohio at the time of his death, and that they became assets of his estate in that state? Property of this character—mere choses in action—has in law no locality separate from the parties by whom it is owned. In the case of the *State Tax on Foreign-held Bonds*, 15 Wall. 300, it was held that bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents

of the state in which the company was incorporated they are property beyond the jurisdiction of that state. It was further held in that case that the fact that the bonds were secured by mortgage upon property situated in Pennsylvania did not make them property within that state, and this for the reason that a mortgage under the laws of Pennsylvania, as here, though in form a conveyance, is a mere security for a debt, and transfers no estate in the mortgaged premises.

"It has long been settled," says the supreme court in *Wilkins v. Elliott, Adm'r*, 9 Wall. 740, "and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated." It follows that the notes and mortgage sued on in this case were assets of the estate of Witte in the state of Ohio, and as such passed to his administrators in that state, who had, according to the plain terms of the statute of Kansas, the right to sue upon them "in like manner and under like restrictions as a non-resident may sue." This statute clearly authorizes a foreign executor to sue in this state to recover any debt which is assets in his hands. I am not prepared to say that it does not authorize such an executor or administrator, in the absence of administration in this state, to sue in this state upon any debt upon which the deceased might have sued at the time of his death; but it is not necessary in this case to decide that point. It is enough for the present to hold that the debt sued for was assets in Ohio, and there passed to complainants.

Demurrer overruled.

ROBINSON TOBACCO Co. v. PHILIPS and others.

(Circuit Court, S. D. New York. July 10, 1882.)

EQUITY—PRACTICE.

Where a cause was set down for hearing upon the pleadings on defendant's motion, expressly to preclude complainant from introducing evidence which it was its duty, under the rules, to introduce in time to permit defendants to reply, complainants cannot be permitted to introduce exhibits and documents not made by proper reference a portion of the bill.

Munday, Evarts & Adcock and Worth Osgood, for complainant.
Banning & Banning, for defendants.

WALLACE, C. J. This cause having been set down for hearing upon the pleadings on motion of the defendants, and because of the complainant's default in taking proofs as required by the rules, the complainant cannot be permitted to introduce exhibits and documents upon such hearing which are not made by proper reference a portion of this bill. The order setting down the case for hearing upon the pleadings was made expressly to preclude the complainant from introducing evidence which it was its duty, under the rules, to proffer in time to permit the defendants to reply to it.

The bill is dismissed, with costs.

UNITED STATES v. LOFTIS.

(District Court, D. Oregon. July 11, 1882.)

1. CRIMES—POSTING NON-MAILABLE MATTER—WRITING DEFINED.

A sealed letter deposited in the mail, addressed to some one, is not a writing or publication within the purview of the first clause of section 3893 of the Revised Statutes, declaring obscene, etc., books, writings, etc., or "other publication of an indecent character," non-mailable.

2. SAME—LETTER SEALED—NOT WITHIN PROHIBITION.

A sealed letter is not within the prohibition of said section 3893, however indecent or obscene in its contents; but if there is any such delineation or language put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime.

Information for Violation of Section 3893 of the Revised Statutes.

James F. Watson, for plaintiff.

George H. Williams and George Durham, for defendant.

DEADY, D. J. The defendant is accused by the information in this case of "the crime of depositing for mailing and delivery in the post-office of the United States a publication of an indecent character, and a letter containing indecent and scurrilous epithets, contrary to section 3893 of the Revised Statutes, committed by knowingly mailing at Rainier, in a sealed envelope, postage paid, and addressed to 'Mr. Joish Way Thayer, Oregon City, Oregon,' a certain obscene and indecent writing and publication" in words and figures as herein set forth.

The defendant demurs to the information because it does not state facts sufficient to constitute a crime, and upon the argument thereof made the point that however the act of the defendant may be char-

acterized by the general charge in the information, its true character must be ascertained from the particular facts stated therein; and that it appeared therefrom that the alleged indecent "publication" was only a private, sealed letter, and not a publication at all, or anything within the purview of the statute; and it was also suggested in support of the demurrer that the language contained in the letter, however filthy, was not "obscene, lewd, or lascivious."

The legislation upon this subject, it appears, commenced with section 148 of the post-office act of July 8, 1872, (17 St. 302,) which provided "that no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which or postal card upon which scurrilous epithets may have been written or printed, or disloyal devices printed or engraven, shall be carried in the mail." By the act of March 3, 1873, (17 St. 599,) said section 148 was amended so as to omit the word "vulgar," and all mention of "disloyal devices," and to include "lewd or lascivious" books, etc., as well as "obscene" ones, and a "paper" as well as a "picture or print;" and the word "indecent" was added to the word "scurrilous," in describing the epithets prohibited on a postal card or the envelope of a letter.

A new clause was also added, prohibiting the transportation in the mails of any "article or thing designed or intended" to prevent conception or procure abortion, or "for any indecent or immoral use or nature," or any communication or notice giving any information where, how, or of whom or by what means any such things may be obtained or made.

This section, as thus amended, became section 3893 of the Revised Statutes, which was again amended by the act of July 12, 1876, (19 St. 90,) so as to add the word "writing" to the category of non-mailable books, etc., and in regard to such letters and postal cards substituted the following: "And every letter, upon the envelope of which, or postal card upon which, indecent, obscene, lewd, or lascivious epithets, terms, or language may be written or printed," is hereby declared to be non-mailable matter.

The punishment for mailing such matter is a fine not less than \$100 nor more than \$500, or imprisonment at hard labor not less than one year nor more than ten years, or both.

It is admitted that the language used in this letter is indecent. Indeed, it is grossly so. The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. Worcest. Dict. And I think it is obscene, also. This latter

word has a wide range in both the Latin and English languages. It includes on the one hand what is merely inauspicious, foul, or indecent, and on the other what is immodest and calculated to excite impure emotions or desires. Worcest. Dict.

It is also admitted that the case made in the information does not come within the clause of the statute directed against letters *eo nomine*; but it is contended by the district attorney that the letter in question is a "writing" within the meaning of that term as used in the first clause of the section, which reads: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, *writing*, print, or other publication of an indecent character," is declared non-mailable.

Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a "publication." This word "writing" occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.

The general phrase with which the enumeration ends, "or other publication of an indecent character," impliedly asserts that the things before enumerated are publications. The expression "John and James and other men" is one in which, by a necessary implication, it is asserted that John and James are men.

A publication is something—as a book or print—which has been published—made public or known to the world. And a writing, as well as a printing, may be published. What constitutes a publication or a making public is a question, and must generally depend upon the circumstances of each case. But a private letter sent by one individual to another in a sealed envelope, cannot be considered a "publication" within this statute. But the fact that the statute has expressly provided for the case of a "letter" in a separate clause, in which the offence that may be committed by means of it is confined to indecent, obscene, etc., language on the envelope in which it is enclosed, is conclusive to my mind that congress did not intend to include it in the term "writing," as used in the clause concerning obscene publications.

It never was the intention of the law to take cognizance of what passes between individuals in private communications under the sanctity and security of a seal. And probably the chief reason for making it a crime to put indecent or obscene delineations or language on the envelope enclosing such communications is to prevent the post-office from being used as a means for committing cowardly and

indecent assaults at a safe distance, or anonymously, upon the feelings and character of any one, by the use of indecent or immoral and offensive epithets and suggestions openly addressed to him on the envelope of a letter or a postal card. But what is said privately—within the envelope and under the seal—the statute does not notice. It could not well do so without establishing an espionage over private correspondence, which would never be thought of in a free country.

As was said by Mr. Justice Field in *Ex parte Jackson*, 96 U. S., 727, "the difficulty attending the subject arises, not from the want of power in congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

This statute is largely preventive in its character. It defines non-mailable matter by its external appearance when a letter or sealed package, and by its contents when not, and therefore open to inspection by the post-office officials. But if it was intended that it should extend to the contents of a sealed letter, some provision would have been made for a legal examination when there was reason to believe that its contents were obnoxious to the law, and its enforcement not left to the chance complaint of the person to whom it might be addressed. But, as the case stands, it is apparent that the matter to be excluded from the mails, and which is made a crime to deposit therein, is such that its illegal character is open to inspection and can be ascertained without breaking the seal of private correspondence.

Therefore, in the case of a letter, unless it is non-mailable by reason of something upon the outside of it, or the envelope in which it is contained, it is mailable without reference to the character or morality of its contents.

And yet it is quite certain that the public good would be promoted and no private right injured by including such a case as this within the statute, upon the complaint of the party injured, and thereby prevent the mails from being used as a comparatively-safe means by one person to annoy and wound the feelings of another by applying to him in a letter indecent or obscene epithets, or accusing him in gross and beastly language of criminal or immoral conduct.

The demurrer is sustained.

BOARDMAN v. THOMPSON.

(Circuit Court, D. Kentucky. July 18, 1882.)

POSTMASTER—REFUSAL TO DELIVER MAIL MATTER—REMEDY.

Where the postmaster refuses to deliver registered letters and letters containing money orders, and other matter addressed through the mail, on which postage has been prepaid, the remedy of the aggrieved party is by *mandamus* or *replevin*, and not by injunction.

In Equity.

David W. Sanders and James A. Beattie, for complainant.

A. A. Freeman, Asst. U. S. Atty. Gen., for defendant.

MATTHEWS, Justice. The question presented in this case, stated in its simplest form, as it is claimed to arise upon the pleadings, is whether this court will, by its writ of injunction, prohibit a postmaster of the United States from refusing to deliver registered letters, and letters containing money orders, and other matter addressed through the mail, on which has been prepaid the proper postage, to the party to whom they are directed. In my opinion there is no such jurisdiction.

If the alleged right exists to require by judicial process the performance of such a duty on the part of a public officer towards a private individual, then it is a legal right, the specific enforcement of which is the proper function of a *mandamus*, or *replevin* for the recovery of the possession of the articles, or an action for damages against the officer. There is no sufficient ground for the interference of equity. If, on the other hand, a postmaster is responsible only to his political superior, and amenable to the law only for such breaches of duty as it has defined, and by the means it has provided, as by indictment and punishment and removal from office, then the present grievance is as much withdrawn from the jurisdiction of a court of equity as from the ordinary course of the common law.

It is quite certain that a perpetual injunction in the terms prayed for could not lawfully be granted, for the postmaster might be lawfully required by the postmaster general to withhold from delivery correspondence with a named party, believed by him to be engaged in a forbidden business; and an injunction for each instance in which it might be shown that no such prohibition existed, would be but an equitable *replevin*, without the justification of preventing a multiplicity of actions.

For these reasons the bill should be dismissed, and it is so ordered.

BARR, D. J., concurs in the foregoing opinion.

HENDERSON v. JACKSON COUNTY.

(Circuit Court, W. D. Missouri, E. D. November, 1881.)

TOWNS—AID TO RAILROADS—ATTACHING TERRITORY.

Under the provision of the constitution, that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits, the legislature has power to attach outside territory to the territory of a town and erect the territory so attached, together with the territory of the town, into a district, and authorize the district so formed to vote a subscription to the stock of a street railroad, and issue bonds in payment thereof, and an act to this effect is constitutional.

Joseph Shippen, for plaintiff.

Comingo & Broadhead, for defendant.

KREKEL, D. J. This suit is brought upon coupons detached from bonds issued by the county of Jackson to the Kansas City & Westport Horse Railroad Company, or bearer. The bonds are in the usual form, and recite that they are issued "pursuant to an order of the county court of Jackson county, made at the June term, 1871, of said court, and authorized by a vote of the people of the district hereinbefore described, by virtue of an act of the general assembly of the state of Missouri, entitled 'An act attaching certain territory to the town of Westport to enable said town to take stock in a railroad,' approved March 18, 1871."

The agreed statement of facts filed in the case shows that on the seventeenth day of April, 1871, the county court of Jackson county, on petition of 47 citizens and tax-payers of the district, established by the act of the eighteenth of March, 1871, made an order for an election submitting to the voters of the district a proposition to subscribe \$25,000 to the capital stock in the Kansas City & Westport Horse Railroad Company in bonds; that an election was held on the sixteenth of May, 1871, and that two-thirds of the qualified voters voted in favor of the proposition; that the amount of stock voted was subscribed; that no stock certificate was issued, but that such issue on demand was refused by the horse railroad company; that Jackson county never voted the stock; that the stock was sold and assigned by Jackson county for \$12,000, which was applied in payment of part of the \$25,000 of bonds issued first falling due; that the county court levied and collected taxes for a number of years in the district to pay the interest coupons, and that the same were paid for the years 1872, 1873, and 1874; that no levy of taxes has taken place since; that the bonds were issued under the acts of March 23, 1868,

and March 18, 1871, and were received by the horse railroad company, and the proceeds thereof applied to the construction of the road; that the plaintiff is a *bona fide* holder without notice.

Two questions are raised and relied on as defences: First, the unconstitutionality of the act of March 18, 1871; and next the want of power under the law to issue bonds by Jackson county for the newly-organized district.

Regarding the constitutionality of the act, we are first referred to the case of *Wells v. City of Weston*, 22 Mo. 384, in which the supreme court holds that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits.

Regarding this decision it is only necessary to say that there is no attempt made on part of the legislature, in the act under consideration, to authorize the town of Westport to levy a tax outside of its corporate limits for its own local purposes, but the intention of the law is to erect a district of which the town of Westport itself is to be a part. The taxes to be levied are to be levied on the property of the district, and for the use and purposes of the district, so that the case cited, admitting it to be good law, has no application.

A more serious question arises here, as in the *Strip Bond Cases*, namely, can the legislature, for the purpose of enabling the people occupying a designated territory to aid in public improvements, erect them into a *quasi* corporation, and authorize them, or the county for them, to issue bonds? In the case of *Ogden v. Davies County*, decided in this court, among other questions the one here suggested was considered, and the conclusion arrived at that there existed no constitutional prohibitions in Missouri against the exercise of the power claimed. In the case mentioned a strip of country had been designated on each side of the Platte City & Fort Des Moines Railroad, authorizing those residing within the strip to vote and subscribe stock. This was done in part of Davies county, through which the railroad passed. Bonds were issued, and litigation arose about them, and, though the case was decided against the bondholders and the validity of the bonds, it was upon other grounds than the one under consideration. The judges were opposed in their opinion on a number of questions, and on account of the doubts prevailing with the judges the case was certified to the supreme court of the United States, where the case is now pending. As now advised, it is held that the legislature of Missouri had power to attach outside territory to the territory of the town of Westport, and erect the territory so attached, together

with the territory of the town, into a district, and authorize the district so formed to vote stock, and issue bonds in payment thereof. Whether it did so, and under what limitation, will be considered after disposing of another constitutional question raised.

The constitution of 1865, in force when the act under consideration was passed, provided that every law enacted shall relate to one subject only, and that shall be expressed in the title. The title of the act of March 18, 1871, is "An act attaching certain territory to the town of Westport to enable said town to take stock in a railroad." It is argued that if the intention of the act was to erect a district, then the title of the act fails to specify its object. What was in the legislative mind at the time of the passage of the act must be gathered from what was sought to be accomplished. A certain territory lay between the corporate limits of Kansas City and Westport. The horse railroad, for the purpose of connecting these places, was to run over this territory. Whatever of benefits were to accrue from the improvement would be shared in by this territory, and hence it was deemed proper that it should share in the burdens, if any. A district was erected so that a tax for the designated purpose might be levied and collected. The erection was an incident, though a necessary one, to the main object. As the main object can be gathered from the title of the act, it must be held not to be invalidated by the constitutional provision cited. The provision requiring the object of the act to be stated in the title is found in nearly all modern constitutions, and is directed against the vicious practice of embodying numerous objects in an act, and thus passing objectionable measures without being discovered on reading by the title only. When such acts come under review in courts, the provision cited is properly applied with strictness. A provision that all bills shall be read at length before final passage, now found in most constitutions, has given additional safeguards against fraudulent legislation, and made it unnecessary, except in special cases, to construe the provision with strictness. Under these views we deem the title of the act sufficiently expressive of its object to avoid the constitutional objection raised.

There remains for consideration the question of authority; that is, had the county court of Jackson county power under then-existing laws to issue the bonds? It must be admitted that this question is not without its difficulties. While the decisions of the United States court are that the bondholder is not bound to look beyond the power to issue the bonds, it may not be unjust, or even exacting, to say to him, this much at least you shall do, and that courts will uphold this

rule with the same strictness with which they have maintained the other.

The first section of the act of the eighteenth of March, 1871, after describing the newly-erected district, states the object of the act to be to enable the town of Westport to subscribe stock to a horse or street railroad, and to levy a tax upon the real and personal property within the district for the payment of such subscription, and for no other purpose, said taxes not to exceed one-half of one per cent., and the subscription not to exceed \$25,000. No direct power to issue bonds is here found.

The agreed statement of facts puts the assessed value of the district at \$200,000, the taxes whereon, at half per cent., would be \$1,000 a year, just sufficient to pay the interest on \$25,000 at 4 per cent. Thus no effective aid could have been rendered in the way of forwarding the improvement contemplated, if the law is construed so as to exclude the issuing of bonds.

The second section of the act provides that "said district, in subscribing to a horse or street railroad company, and in voting taxes to be levied for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships." This so-called township-aid act of March 23, 1868, here referred to, contains provisions aside from the voting and levying of taxes; also for the issuing of bonds to pay such subscriptions. It seems that from abundant caution this township-aid act was amended by the act of March 24, 1870, and its provisions made applicable to portions of municipal townships to vote and subscribe stock. Does the act of March 18, 1871, by its reference to the act of the twenty-third of March, 1868, so far make the latter act and its amendment a part of the law, so as to furnish authority to the county of Jackson to issue bonds to pay subscriptions to the horse railroad? That it has been so construed by the parties interested there can be no doubt. The order of the county court directing the election to be held submits to the voters, among other things, the question of the issuing of bonds in payment of the subscription, and does so in exact conformity to the municipal township-aid act, which authorizes the issuing of bonds, if approved, by a two-thirds vote. In the furtherance of justice it must be held that the act of the eighteenth of March, 1871, so far made the act of March 23, 1868, a part, as to authorize the issuing of the bonds. Here the county of Jackson, through its legally-constituted authority, the county court, subscribed stock. It has sold and assigned this stock, and with the \$12,000, proceeds of the sale,

paid part of the bonds issued. The town of Westport and the district of which it constitutes a part have accomplished the object of constructing a horse railroad, and are enjoying its benefits. They have recognized the bonds and given them value by paying part of them, and the interest on the whole for a number of years. To turn around now, after all this, and say no power to issue the bonds existed, savors of injustice not to be tolerated or upheld by the court, unless bound to do so under the strict letter of the law. Any doubt as to the proper construction of the act must be solved in favor of good faith. If the question was on the issuing of an injunction, or other proper remedy, to prevent the issuing of the bonds for a want of power, any doubt as to a proper construction of the act would be solved against the exercise of the doubtful power.

Under the views entertained by the court the bonds are declared valid, and the judgment will be for plaintiff.

ERWIN v. ST. JOSEPH BOARD OF PUBLIC SCHOOLS.

OSBORNE v. SAME.

(*Circuit Court, W. D. Missouri, E. D. November, 1880.*)

PUBLIC SCHOOL BOARD—AUTHORITY OF—NOT TO ISSUE BONDS.

The boundary to the discretion of the board of public schools of St. Joseph as to the building of school-houses is fixed by the charter of the corporation, and their authority is limited and defined in the fourteenth section of the act of incorporation, which does not authorize the board to create a debt for that purpose and issue bonds for the payment thereof.

The facts appear in the opinion.

Woodson & Crosby, for plaintiff.

Flanagan, for defendant.

KREKEL, D. J. These suits are instituted on detached coupons of the same issue of bonds emitted by the St. Joseph Board of Public Schools.

The question to be determined is, had the board authority to issue them? The bonds declared on are in the following form:

"No. ——. UNITED STATES OF AMERICA. \$1,000.

"State of Missouri, City of St. Joseph.

"The St. Joseph Board of Public Schools of the city of St. Joseph, in the county of Buchanan, in the state of Missouri, being legally organized and

assembled, do hereby acknowledge themselves indebted to ———, or order, in the sum of \$1,000, which said sum they bind themselves, and their successors in office, to pay the said ———, or order, on or before the first day of April, 1888, at the National Bank of Commerce, in the city of New York, and interest thereon from April 1, 1868, at the rate of 10 per centum per annum, payable half yearly on the first days of April and October, on presentation of the proper coupons hereto annexed; reserving to themselves and their successors in office the right of paying this bond, with the interest thereon, at any time after the expiration of 10 years from the date hereof. This bond is secured by the real and personal estate owned and held by the said board of public schools in the city of St. Joseph in their corporate capacity, in conformity with the Revised Statutes of Missouri for the year 1865.

"In testimony whereof, the said board of public schools have caused their corporate seal to be hereto affixed, and their president and secretary of the said board to sign their names to the same, and also the treasurer to countersign the same, this first day of April, A. D. 1868.

[Signed]

"SAMUEL HAYS, President.

[Seal.]

"EDWARD B. NEELEY, Secretary

"JOHN CALHOUN, Treasurer."

The petition is in the usual form, and alleges that the bonds were issued, "with others, in accordance with and by virtue of the authority vested in the defendant by its charter of incorporation, and the acts of the general assembly of the state of Missouri amendatory thereto, for the purpose of raising money to build school-houses, and 20 instalments of interest have been paid thereon." It is not pretended that there is direct authority in any of the laws under which these bonds were issued, to which reference will hereafter be made, to issue the same; but it is claimed that, from the nature of the grant of power in the charter, implied power authorizing the issue can be deduced; that on account of the object and purposes of the corporation a liberal construction, in harmony with the tendencies of legislation in Missouri regarding schools, should be indulged in; that if any doubt regarding the proper construction of the law exists, the construction given to it by those whose duty it was to carry out the law should prevail; that the acquiescence of the people of St. Joseph for more than 10 years, indicated by the payment of the interest on the bonds, and the furtherance of honesty, should incline the court to uphold the bonds.

We proceed to examine the laws under which the bonds were issued. The St. Joseph Board of Public Schools was incorporated by an act of the legislature of Missouri, approved January 4, 1860, and from this act, its amendments and laws incorporated into it, we proceed to

quote such portions as are relied on by the plaintiff, and citing other parts having a bearing on the case.

We are directed, in the first place, by plaintiff's counsel to that portion of the first section of the charter which provides that the board may "do all other acts as natural persons." The first section, from which this quotation is taken, defines the boundaries of the corporation, gives it its corporate name, confers perpetual succession, authorizes it to sue for and be sued, and proceeds, "may purchase, receive, and hold property, real and personal, may lease, sell, or dispose of the same, and do all other acts as natural persons." Very many acts must of necessity be done in connection with the execution of the powers here granted; and the natural construction of the language, "and do all other acts as natural persons," must be construed to mean the doing of the acts embraced within the powers granted, but not specified. Corporations obtain powers by grant exclusively, and from their thus limited character can claim such implied powers only as are *necessary* to carry out the obvious object and intention of the charter. Especially is this true in cases where the act of incorporation, when properly construed, provides for the very contingencies which are claimed to have existed, creating a necessity for the exercise of implied powers.

Upon another branch of the case something more will be said on this point.

The next point to which our attention is called by plaintiff's attorneys is the concluding portion of section 5, which reads as follows: "And generally to do all lawful acts which may be proper and convenient to carry into effect the objects of said corporation."

The fifth section, from which this quotation is extracted, grants the powers which the corporation is to exercise, namely: Provide for the election of its members, compel attendance at meetings, expel members, make rules for the proceedings of the board, control the schools and property of the corporation, to loan its moneys and their proceeds, and provides:

"The board shall also have power to make rules, regulations, and ordinances necessary for the management and control of the property belonging to the corporation, and for the government, discipline, and other management of the schools under their charge, so that the same shall not be inconsistent with the laws of the land, and generally to all lawful acts which may be proper and convenient to carry into effect the objects of said corporation."

Much of what has already been said regarding the construction of such language as is here employed applies to the provision cited; but

it is insisted that the words "to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation," when viewed in connection with the provision in the first section, "to do all other acts as natural persons," has peculiar significance, and may well be construed to authorize the creation of a debt for school purposes, and the issuing of bonds therefor. On the words "proper and convenient" great stress is laid in the argument. What do these words, when read in their connection, mean? The answer is, they suggest the exercise of caution in the doing of the manifold acts which a board of directors is called upon to perform in the management of its schools. The building of school-houses, under the view taken by plaintiff's counsel, is claimed to have been not only proper and convenient, but necessary to carry into effect the objects of the corporation. There must necessarily be some limitation—some boundary as to what may be proper and convenient. Has the charter left the fixing of this boundary to the discretion of the board, or defined it? We think it has clearly and indisputably defined and limited it in the fourteenth section of the act of incorporation, which is as follows:

"The board shall cause an estimate of the amount of money necessary to be raised for the purpose of building and repairing school-houses and furnishing the same, together with the amount necessary to meet the other expenses of the corporation, to be made out and certified under the seal of the board annually; and a copy of such estimate duly authenticated shall be filed with the clerk of the county court of Buchanan county on or before the first Monday in each year, and the county court shall cause the same so certified to be levied upon all taxable property, real and personal, in said district, and the amount so levied shall be collected in the manner prescribed by law for the collection of state and county taxes: provided, the taxes mentioned in this section shall not exceed one-fifth of 1 per cent. (amended by the act of 1869, and made one-half of 1 per cent.)"

It is scarcely possible to draw a clearer provision of law defining the limits within which any discretion regarding the building of school-houses and other expenditures for school purposes in St. Joseph should be exercised by the board. But it is argued that the tax limitations were such as not to produce a sufficient amount of revenue to build and pay for the number of school-houses necessary, proper, and convenient. How can this be said, in the face of the fact that the people of St. Joseph had in a measure, by and through their charter, determined this very question? If we were to approve the view taken by the board, where, it may be asked, are there limits to the implied powers of the St. Joseph school board? The board

may issue one hundred thousand or a million of dollars of bonds. We would be bound to hold the issue of the one amount as well as the other to be valid; and would further be bound to cause the taxes to be collected to pay the interest and principal, when due, for whatever amount the board saw fit to issue the bonds. There is a vast difference between building or purchasing school-houses and the appointed revenues of the district, and the making use of the credit of the city by issuing bonds and using them for that purpose; the one leading to prudence and caution in expenditure, the other tending towards extravagance, and going beyond the real wants of the city. There is scarcely any use in providing limitations to the exercise of powers in laws or charter, if they can be evaded under the guise of implied powers. I fully concur in the reasoning on this subject in the case of *Gauss v. Clarksville*, 19 Alb. Law J. 253.

It will not do to substitute discretion, however soundly exercised and however laudable the object, for law; and especially not in construing charters of corporations. But the charter under consideration has in its twenty-third section this provision: The legislature, after reserving the power to change, alter, and repeal the charter, goes on to provide "that no law hereafter passed shall be construed as changing, altering, or repealing the whole or any part of this act, unless this act be expressly mentioned in such law."

Laws authorizing the creation of debts and the issuing of bonds therefor for the purpose of building school-houses, passed after the charter and amendment thereof in 1866, and after the issuing of the bonds in controversy, can have no bearing on this case.

We have examined with care the amendments of the original charter in 1866, and the town and village school law of 1855, made a part of the original charter.

In the amendment of 1866 no trace of authority is found authorizing the creation of a debt for the purpose of building school-houses, much less the issuing of bonds therefor. By the ninth subdivision of the twenty-second section of the town and village school act of 1855, granting powers to school boards, the right is given them:

"To determine the number of common schools to be kept; to designate and lease or purchase sites for school-houses. (10) To build, hire, or purchase school-houses, and keep in repair and furnish the same with fuel, furniture, and necessary appendages. (11) To appropriate and apply such part of the town or village school moneys as may be necessary to the purchase or lease of sites for school-houses to the building, hiring, keeping in repair, and furnishing school-houses with fuel, furniture, and appendages."

It will be observed that here, as in the charter, not only is there no authority to create a debt to build school-houses, but, on the contrary, the creation of a debt is implicitly denied by the provision that such part of the town and village school moneys as may be necessary for the building, hiring, keeping in repair school-houses shall be applied for that purpose.

The conclusion reached against the power to issue the bonds in suit is fortified by the subsequent legislation of Missouri, which expressly gives the power to issue school bonds.

The power to create a debt, and the issuing of commercial securities therefor, are quite different things. The ordinary evidence of corporate indebtedness, such as warrants, orders, notes, are subject to legal and equitable defences. This, being known, induces prudence in their issue, and caution in receiving them. Once allow such debts to be put in the shape of commercial securities, preventing all inquiry in the hands of a *bona fide* holder except that of power to issue, and you open the doors wide, indeed invite the commission of fraud, and point the way to its successful accomplishment.

As to the argument that a construction given by those who had to execute the law, and the acquiescence in such construction by paying taxes on the bonds for a long period of time, it is sufficient to say that we are precluded from making inquiry, for the supreme court of the United States has again and again decided that such acts cannot cure the want of power, and have held the bondholder to strict inquiry regarding its existence.

The conclusions reached are that the St. Joseph Board of Public Schools had no power under its charter, nor the law of 1855, regarding towns and villages, made part of the charter, to issue the bonds, the coupons whereof are in controversy, and that the demurrer to the petition must be sustained.

Ordered accordingly.

NISBIT, Assignee, etc., v. MACON BANK & TRUST Co. and others.*

(Circuit Court, S. D. Georgia, W. D. June 17, 1882.)

1. BANKRUPTCY—ILLEGAL PREFERENCE.

Cubbedge & Lockett were members of the firm of C., H. & Co., and also president and cashier of a "Bank & Trust Co.," in which C., H. & Co. were stockholders. The firm was indebted to the B. & T. Co., and agreed verbally with C. and L., as officers thereof, to secure the indebtedness by the stock which the firm owned in the B. & T. Co. This agreement was reported to and accepted by the directors of the B. & T. Co. Various stock certificates standing on the books of the B. & T. Co. in the name of C., H. & Co. were, under their agreement, (probably,) deposited with and held by Lockett as cashier of the B. & T. Co.; but no written transfer, or power of attorney authorizing transfer, was executed. The firm had been insolvent for some time, and a few days before its suspension, also within less than four months before adjudication in bankruptcy, the firm for the first time made a formal note evidencing said indebtedness, and formally transferred said shares upon the books to the B. & T. Co. *Held*, that the assignee in bankruptcy of said firm is entitled to recover said stock, or the value thereof, from said B. & T. Co.

2. SAME—NOTICE.

Where two members of an insolvent firm are president and cashier of a bank, their knowledge of the insolvency of their firm is the knowledge of the bank.

3. PLEDGE OF STOCK.

A transfer on the books of the company, or the execution of a power of attorney authorizing a transfer, is essential to pledge of corporate stock, (except when by statute it is otherwise provided, as in Louisiana.)

4. SAME—REQUISITES OF POSSESSION.

When the pledgeors of stock retain the title and control of the stock pledged, the power of withdrawal and substitution, so that they can transfer or negotiate the same without consulting the pledgee, while the pledgee could not control the stock without consulting the pledgeors, the mere deposit of the stock certificates (standing in the name of the pledgeors) with the pledgee does not create a valid pledge thereof.

In Equity. Submitted upon pleadings and evidence for final decree.

Hill & Harris, for complainant.

Bacon & Rutherford, contra.

PARDEE, C. J. For several years prior to June 6, 1878, R. W. Cubbedge, William Hazlehurst, and J. W. Lockett, under the firm name of Cubbedge, Hazlehurst & Co., were engaged in the city of Macon in carrying on a general banking and brokerage business. On the said sixth day of June, 1878, the said firm failed in business and made a general assignment of their assets then on hand to W. W.

*Reported by W. B. Hill, Esq., of the Macon bar.

Carnes for the benefit of their creditors. On or about the twenty-fifth of August, 1878, the members of said firm were on their own petition adjudicated bankrupts, and thereupon the complainant was appointed as assignee of said firm. On the twenty-third day of April, 1880, the assignee filed his bill in the United States court against the same firm, and against the members of the same in certain representative capacities, and against certain other parties, including the Macon Bank & Trust Company, the object of said bill being to set aside certain mortgages and transfers of property alleged to have been made by said firm prior to said assignment in fraud of the bankrupt act and in violation of its provisions. As to the other parties in the case, a decree has been had in this court affirming the validity of said mortgages and conveyances, and the case is now against the Macon Bank & Trust Company to set aside the transfer to it of 212 shares of the capital stock of the said Macon Bank & Trust Company by the said Cubbedge, Hazlehurst & Co.

Complainant in his bill alleges that the transfer of said 212 shares of stock to the Macon Bank & Trust Company by Cubbedge, Hazlehurst & Co. but a few days prior to said assignment was fraudulent; that said firm of Cubbedge, Hazlehurst & Co. and the said Macon Bank & Trust Company were practically one organization; that the said transfer was made by Cubbedge, Hazlehurst & Co. when they were bankrupts and insolvent, and when they were in contemplation of bankruptcy and insolvency, and with the intent to work a fraud on the bankrupt act, and to defeat and delay the operation of said act; and that such intent was known to the Macon Bank & Trust Company at the time of receiving said transfer. The complainant also alleges that Cubbedge, Hazlehurst & Co. were stockholders to the extent of the 212 shares of stock in the Macon Bank & Trust Company, and that said transfer was made for their personal benefit as such stockholders; and that said transfer was made within four months prior to the bankruptcy of said firm; also that said Macon Bank & Trust Company had cause to know that said Cubbedge, Hazlehurst & Co. were insolvent at the time, and that such transfer was made to prevent the property of Cubbedge, Hazlehurst & Co. from being distributed under the bankrupt act, and to impair, hinder, impede, and delay the operation of said act, and was made within less than six months prior to the filing of the petition in bankruptcy.

The answer of the Macon Bank & Trust Company, as stated by its counsel, presents substantially the following case: It is admitted that

the final transfer of the 212 shares was made by Cubbedge, Hazlehurst & Co. to the Macon Bank & Trust Company on the date charged in the bill, but it is also averred that said transfer was simply a hypothecation of said shares of stock made more than six months prior to the time of the said transfer, which hypothecation was made in good faith to secure a *bona fide* indebtedness of Cubbedge, Hazlehurst & Co. to the Macon Bank & Trust Company. The history of this hypothecation and subsequent transfer, as alleged in the answer, is, in brief, as follows: The capital stock of this bank was accumulated by the payment periodically of small instalments by the stockholders. Shortly after the bank began to run it was so crippled, by bad loans to a large amount, that the business of the bank could only be carried on by making some economical arrangement for its ordinary expenses. Accordingly, Cubbedge was elected president and Lockett cashier, on small salaries, with an arrangement that the business of the bank should be carried on in the banking office of Cubbedge, Hazlehurst & Co., thus saving bank rent. After this arrangement the Macon Bank & Trust Company received no deposits, and its own money, as it came in, was, when not otherwise loaned out, kept on deposit with Cubbedge, Hazlehurst & Co. The books of the Macon Bank & Trust Company showed what money was received for it, and the books of Cubbedge, Hazlehurst & Co. showed how much money they had on deposit of the funds of the Macon Bank & Trust Company. This amount naturally varied. As the money thus on deposit was loaned out for the Macon Bank & Trust Company, the amount of such deposit decreased; and, on the other hand, as money was paid in and not loaned out the deposit increased.

The amount of these deposits was regarded by Cubbedge, Hazlehurst & Co. as a loan, as it indeed was. As this amount was constantly varying, and subject to call whenever needed in the business of the bank, and was being in fact daily called in part to meet the demands required in the business of the bank, no paper was made by Cubbedge, Hazlehurst & Co. to represent this indebtedness to the Macon Bank & Trust Company. It would have been impracticable to have made papers that would have corresponded to the continual changes in the amount of such indebtedness. It would have been necessary not only to cancel the paper and make another each day, but a dozen or twenty times a day, as the balance to the credit of the Macon Bank & Trust Company constantly fluctuated, increasing as the money came in, and decreasing as it was paid out to borrowers, etc. Hence it was only practicable to have this indebtedness shown

in the balances on the books. For the same reason, on account of the constantly fluctuating amount of the indebtedness, it was necessary to make a provision of a general character to secure the Macon Bank & Trust Company in the amount of this indebtedness.

It was therefore arranged and agreed between Cubbedge, as president, and Lockett, as cashier, on one part, and each of the three members of the firm of Cubbedge, Hazlehurst & Co. on the other part, that to secure the amount of this indebtedness of said firm to said bank, Cubbedge, Hazlehurst & Co. would keep continuously deposited with the Macon Bank & Trust Company, and hypothecated with the same, a sufficiency of the stock scrip of the firm in the Macon Bank & Trust Company. This arrangement and agreement was not only made between the said officers of the bank and the several members of the firm, but the same was reported to the directors of the Macon Bank & Trust Company, and by them approved and accepted. In May, 1878, the balance in favor of the bank against the firm was \$21,200, and the 212 shares of said stock were formally transferred by the firm to the bank, the same being simply to fully transfer the stock thus previously hypothecated.

To the answer a formal replication is pleaded, and the case has been heard on its merits.

The evidence in the case sustains in the main the averments in the answer, with the unimportant modification that there was no actual possession or delivery of the stock in controversy until May 29, 1878, five days before the assignment to Carnes, and about 90 days before the adjudication in bankruptcy. Indeed, the evidence of the transfer stock-book of the bank is that party shares of that stock were acquired by the firm of Cubbedge, Hazlehurst & Co. on that day. See stock certificate, No. 253. That under the verbal agreement between Cubbedge, president, and Lockett, cashier, of the one part, and those gentlemen and Hazlehurst, forming the firm of Cubbedge, Hazlehurst & Co., of the other part, to protect the bank by hypothecating the scrip of the bank as security for such balances as might from time to time be due from the firm to the bank, various certificates of stock of the bank belonging to the firm were placed by Lockett, partner in the firm and cashier in the bank, from time to time, in a separate box under his own control in the vault of the firm, appears to be very probable; but it does not appear that any transfer or authority to transfer was ever given, nor that the certificates were retained by the bank as a certain deposit, but it does appear that the firm retained

and exercised the right of withdrawal and substitution at their own convenience, and without consulting the bank. And it also appears that the stock so separated by Lockett never passed from the control of the firm and into the control of the bank until the twenty-ninth of May, 1878, for while the certificates were in the possession of a joint agent the bank could not transfer, assign, or negotiate them, and Cubbedge, Hazlehurst & Co. could.

What is necessary to constitute a valid pledge of stock in an incorporated company has been the subject of much discussion and learning, with resulting conflicting decisions, but although formerly there was doubt whether it could be the subject of a pledge at all, there is no doubt, in the absence of statutory provisions, that to pledge stock some written transfer or contract is necessary as against third parties. Mere handing over the certificate is not sufficient. There must be a transfer on the books of the company, or a power of attorney authorizing a transfer, or some assignment or contract in writing by which the holder may assert title and compel a transfer when desired. See Law of Collateral Securities, by Jones, (Am. Law Rev. No. 2, Feb. 1880.)

The only state where, I am informed, delivery of the certificate of stock is sufficient is Louisiana, and there only by express provisions of the Code. See La. Rev. Civ. Code, art. 3158. The decisions of the supreme court of that state, (30 La. Ann. 714, 1378,) which this court followed in *Banking Ass'n v. Wiltz*, 10 FED. REP. 330, were each of them based on written assignments, and the case also cited 31 La. Ann. 149, turned on the frauds committed by the pledgors, who were officers of the defending company.

In this state, (Georgia,) whose laws must control this case, the statute is specific that the thing pledged must be delivered. Ga. Code, § 2138. The case, then, is to be taken as showing an agreement to pledge such amount of stock as should be necessary, running through several years, accompanied by a separation of the certificates of stock, but no pledge until May 29, 1878, from which it follows that, as against the complainant as assignee in bankruptcy, the defendant bank is without good title to the stock in controversy, and must surrender the same or its value. There can be no pledge of property for the security of the payment of a debt without delivery of the thing pledged, cases of promissory notes and evidences of debt excepted. Ga. Code, § 2138. See, also, 96 U. S. 467. An agreement to pledge gives no privilege. *Casey v. Cavaroc*, 96 U. S. 467. Equity will not regard a thing as done which has not been done,

when it would injure third parties who have sustained detriment and acquired rights by what has been done. *Id.*

The pledge made May 29, 1878, by the bankrupts to the defendant is void under section 5128, Rev. St., for it was made by an insolvent with a view of giving a preference, and the person receiving had a reasonable cause to believe the pledgor was insolvent, and the same was within four months prior to the adjudication in bankruptcy. There can be no doubt that the firm of Cubbedge, Hazlehurst & Co. were insolvent, and that Cubbedge and Lockett knew it, nor can there be any doubt that the knowledge of the president and cashier of the bank was the knowledge of the bank. See Wade, Notice, § 675. The very transaction itself, under the light of this case, puts the pledge of May 29th within the statute.

For years the verbal agreement to keep the bank secured with its own scrip was allowed to run with no note, no transfer, nothing but Lockett's box, which he emptied and replenished as the exigencies of the case required, when, five days before the crash, the most formal of notes and formal of pledges were put in writing, duly witnessed, and the stock transferred on the books besides. The parties had slept too long on this agreement for a continuous hypothecation to have been wakened without occasion of some kind. What could it have been? Not the insolvency of Cubbedge, Hazlehurst & Co., for they had been insolvent for years. Not new business methods, for no change appears to have been made among the managers of the bank. There is no showing of a sudden want of the bank for either money or collaterals. In short, no explanation is given or attempted, and it is a fair inference from the circumstances that bankruptcy was contemplated, and therefore the long-standing agreement to hypothecate stock scrip to secure the bank was carried out, so that the bank might be protected in preference to other creditors.

The other branches of this case, *i. e.*, as to transfers being void because of usury in the debt secured by the transfer, need not be discussed nor decided.

The complainant should have a decree adjudging him entitled to the 212 shares of stock in controversy, and compelling the Macon Bank & Trust Company to deliver the same in kind or in value; the latter to be fixed by reference to a master, as the evidence in the case is incomplete on that point.

In re CAROTHERS, Bankrupt.

(District Court, W. D. Pennsylvania. July 15, 1882)

BANKRUPTCY—SALE OF MORTGAGED PREMISES—PARAMOUNT LIEN.

Although a mortgage may be within the equity of the rule that where several pieces of real estate, subject to a common encumbrance, are successively aliened, the properties so disposed of are liable for the amount of the encumbrance in the inverse order of alienation; yet, where the mortgaged property is sold in bankruptcy discharged of encumbrances, the said rule cannot be invoked where the effect would be to deprive the paramount lien creditor of the proceeds of sale. The latter is entitled to the fund, and such mortgagee must seek subrogation and indemnity in another proceeding.

In Bankruptcy.

Sur exceptions by William A. Shaw to register's distribution of proceeds of sale of real estate.

W. S. Purviance, for exceptions.

John Dalzell, for report.

ACHESON, D. J. Mrs. Margaret J. Chalfant sold the bankrupt a tract of land, taking from him a mortgage thereon to secure his purchase-money bond. After the recording of this mortgage the bankrupt laid out the land into lots. He subsequently executed a mortgage upon three of them—numbered 1, 2, and 3—to William A. Shaw, to secure a loan of money. The bankrupt sold lots to divers persons after recording of the Shaw mortgage. Mrs. Chalfant brought suit on her bond, and on June 22, 1874, obtained judgment. All these transactions were before the bankruptcy proceedings were commenced. At that time the bankrupt owned lots 1, 2, and 3, and the assignee, under an order of this court made upon his petition, sold said lots discharged of liens. The register appropriated the proceeds of sale to Mrs. Chalfant's mortgage debt. Of this appropriation Shaw complains, he insisting that for his relief Mrs. Chalfant should first resort to the lots bound by her mortgage, which the bankrupt sold after the recording of his (Shaw's) mortgage.

The principle invoked by Shaw is that where several pieces of real estate are subject to a common encumbrance and are aliened successively, the properties so disposed of are liable for the amount of the encumbrance in inverse order of alienation. *Martin's Appeal*, 97 Pa. St. 85. Doubtless, in a proper case, a mortgagee may claim the benefit of this equitable doctrine, and Shaw may find it available to him as against the bankrupt's later vendees in an appropriate proceeding for subrogation and indemnity. *Neff's Appeal*, 9 Watts & S.

86; *Arna's Appeal*, 65 Pa. St. 72. But clearly he has no equity as against Mrs. Chalfant. *Id.* Her mortgage was the first lien, and was discharged from the lots sold in bankruptcy. Unquestionably her lien was transferred to the proceeds of sale, and her right to receive the same cannot be gainsaid by a junior mortgagee upon the ground here relied on.

The court is not dealing with two funds, both subject to the lien of one creditor, while the other creditor has a lien against one fund only. There is but one fund for distribution, and to it Mrs. Chalfant has a perfect legal right. Moreover, the vendees of the bankrupt are not before the court, and the equities between Shaw and them cannot be settled in this proceeding.

Upon general principles, therefore, the register was right in appropriating the fund to Mrs. Chalfant; but his distribution was eminently proper, in view of the provisions of the act of assembly of April 22, 1856, (par. 827.) Under that act Shaw was bound to tender Mrs. Chalfant the amount due her before he could compel her to first levy upon the lots alienated after the recording of his mortgage. *Arna's Appeal*, *supra*; *Phelps's Appeal*, 10 W. N. C. 525.

This cause came on for final hearing June 12, 1882, and was argued by counsel; and now, July 15, 1882, upon consideration, the exceptions to the register's report are overruled and his distribution is confirmed absolutely.

CHAPMAN v. FERRY and another.

(Circuit Court, D. Oregon. July 10, 1882.)

1. COPYRIGHT—PRACTICE—DISCOVERY.

A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of a penalty or forfeiture; as an allegation concerning the number of copies sold and on hand of a pirated map.

2. SAME—INFRINGEMENT—PENALTIES AND FORFEITURES.

The penalties and forfeitures given by section 4965 of the Rev. St. (16 St. 214) for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer in a bill that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction is demurrable, as asking for the enforcement of such forfeiture.

3. SAME—DAMAGES.

Damages as well as profits may now be recovered in equity for an infringement of a patent, but not a copyright.

Suit in Equity for Infringement of Copyright.

H. Y. Thompson, for plaintiff.

Frederick V. Holman, for defendant.

DEADY, D. J. This suit is brought to obtain an injunction restraining the defendants from infringing the copyright of a "Map of the cities of Portland and East Portland and the town of Albina, Oregon," compiled and published by plaintiff, and for an account of sales.

The bill states in detail the steps taken by the plaintiff in 1874-5 to obtain the copyright of the map, and his ownership thereof ever since; the infringement of the same by the defendants on May 10, 1881, by the publication of 500 copies of a map entitled "Map of the cities of Portland and East Portland and the town of Albina, Oregon;" and alleges that the same is substantially a copy of the plaintiff's, and an infringement of his copyright; that the defendants have sold 300 copies of said map at five dollars a copy, to the damage of the plaintiff \$3,000, and is still the owner of the plate upon which the same were printed and the 200 copies remaining unsold, which they continue to offer for sale. The prayer of the bill is that the defendants may "answer all and singular the matters and things" set forth therein, and that they be required to surrender the copies on hand and the plate to an officer of this court "to be cancelled and destroyed."

The defendants demur to so much and such parts of the bill as seek to have a discovery as to the number of copies of their map sold or on hand, because the same will subject them to penalties and forfeitures as provided in section 4965 of the Revised Statutes.

It is well established that a defendant may "demur to a discovery which may subject him to anything in the nature of a penalty or forfeiture," (Story, Eq. Pl. § 583;) and by the section of the Revised Statutes aforesaid the defendants are made liable to forfeit to the plaintiff the plate upon which their map was printed and every sheet thereof, and also to pay a penalty of one dollar for every sheet found in their possession.

Apparently, then, the demurrer is well taken; but counsel for the plaintiff contends that this is not a bill of discovery, and that nothing is sought to be discovered from the defendants in that respect. But it is said, on good authority, that every bill for relief is in reality a bill for discovery, since it asks from the defendant an answer as to all the matters charged therein. Story, Eq. Pl. § 311. And by the same authority an answer must confess, avoid, deny, or traverse all the material parts of the bill. *Id.* § 852. The prayer

for the surrender of the plate and printed copies on hand is also demurrable.

The forfeitures and penalties given by section 4965 of the Revised Statutes (17 St. 214) are not enforceable in a court of equity, in the absence of an express statute to that effect. To recover the forfeiture and penalties given by this section for the infringement of his copyright, the plaintiff must resort to an action at law. *Stevens v. Cady*, 2 Curt. 200; *Stevens v. Gladding*, 17 How. 453. Admitting this, however, counsel for the plaintiff insists that the surrender of these articles as prayed for is not an enforcement of the forfeiture of them to the plaintiff, but only a means of enforcing the decree for a permanent injunction. No authority is cited for this distinction. To require the defendants to surrender their plate and copies of map for destruction will effectually enforce the forfeiture as against them and in favor of the plaintiff, so far and in the mode he desired. In fact, upon the delivery of the articles to the officer of this court for the purpose desired, the forfeiture is there and thereby enforced against the defendants; their right in and to the property is divested, and it is disposed of with the consent of the plaintiff.

On the argument, counsel for the defendants also assigned, *ore tenus*, as a cause of demurrer to so much of the bill as alleged the amount of damages sustained by the plaintiff on account of the infringement, that damages are not recoverable in a court of equity, and the relief is limited to an account and recovery of the profits made by the defendants on the sale of the infringing map.

This was the rule in patent cases until the passage of the act of July 8, 1870, when by section 55 of that act (16 St. 206; section 4921 Rev. St.) it was provided that in a suit of equity, when a decree is given for an infringement, the plaintiff shall be entitled to recover not only profits made by the defendant, but the damages he has sustained thereby. Curt. Pat. § 341; *Williams v. Leonard*, 9 Blatchf. 476; *Andrews v. Creegan*, 7 FED. REP. 478. But the provisions of the act of July 8, 1870, concerning patents, do not appear to be applicable to copyrights, which are provided for separately in the sections from 85 to 110, inclusive. By section 106 jurisdiction is given to the courts of the United States of suits and actions arising under "the copyright laws of the United States," and power is given them to grant injunctions according to the course and principles of courts of equity, an incident of which is a right to an account of profits. *Stevens v. Gladding*, 17 How. 456. But no provision is made, as in section 55, *supra*, concerning cases arising under "the patent laws of the

United States," for the recovery of damages as well as profits in a suit in equity. The reason for this distinction between subjects so nearly identical in their nature and origin is not apparent, but the statute has made it and the courts must observe it.

The demurrer is sustained.

NOTE. A defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. *Atwill v. Ferrett*, 2 Blatchf. 39. The defendant cannot be compelled, under a subpoena *duces tecum*, to produce his books and papers and plates to be used in evidence for plaintiff. *Johnson v. Donaldson*, 18 Blatchf. 287; S. C. 3 FED. REP. 22. A motion to compel such testimony will not be granted in aid of an action for trespass for the violation of a copyright. *Atwill v. Ferrett*, 2 Blatchf. 39. The relief will only be to the extent of the part infringed. *Story v. Holcombe*, 4 McLean, 306. The various provisions of the law should be liberally construed to give effect to what may be considered the inherent right of the author to his work. *Myers v. Callaghan*, 5 FED. REP. 726. But equity will not, at the instance of the author, where he has made an assignment forever, restrain the assignee from selling after a renewal taken out by the author. *Paige v. Banks*, 7 Blatchf. 152. The right to a chart is violated only when another copies from the chart of him who has secured the copyright. *Blunt v. Patten*, 2 Paine, 397. Compare *Gray v. Russell*, 1 Story, 11; *Emerson v. Davies*, 3 Story, 768. The publication of a map made from materials collected while in the service of the government as draughtsman belongs to the government. *Commonwealth v. Desilvan*, 3 Phila. 31. See *Heine v. Appleton*, 4 Blatchf. 125. Compiling maps of a city of a particular design from public records into an atlas, and without taking out a copyright making several copies and selling them, and placing one copy in the hands of the city for public use, is a dedication to public use, (*Rees v. Peltzer*, 75 Ill. 475;) but depositing one chart in the navy department does not make it public property. *Blunt v. Patten*, 2 Paine, 307. A single sheet containing diagrams is a subject of copyright; the form of the publication is immaterial, (*Drury v. Ewing*, 1 Bond, 540;) but an advertising card is not. See *Ehret v. Pierce*, 10 FED. REP. 558.—[ED.]

BURTON v. STRATTON and others.

(Circuit Court, E. D. Michigan. July 3, 1882.)

1. TRADE-MARKS—MERE WORDS.

Mere words may become valid trade-marks, when they are merely arbitrary, or are indicative of origin or ownership in the original proprietor.

2. SAME—WHEN PROTECTED.

Words which have acquired a significance in the marks as expressive only of the name or quality of an article cannot be appropriated as a trade-mark. But

if the primary object of the trade-mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality, is not of itself sufficient to debar the owners of protection, or make it the common property of the trade. But if the name be suffered to come into general use without objection from the proprietor, it may become merely generic, or indicative of quality.

3. SAME—AN APPURTENANCE—SALE OR ASSIGNMENT OF.

A trade-mark, indicative of origin or ownership in the proprietor of a certain business, may be sold or assigned by him as an appurtenance of such business, and the assignee may become entitled to the exclusive use of such mark, even as against such proprietor himself. *Held*, that the right to use the words "Twin Brothers," in connection with portraits of the twins, had been lawfully assigned to the plaintiff, and that he was entitled to an injunction against one of the twins who had set up a separate establishment, and was making use of this trade-mark in manufacturing yeast.

In Equity.

This was a bill in equity to enjoin the use of a trade-mark. The bill set forth that the plaintiff had, for a long time, made a certain yeast, put up in wrappers and labels, specimens of which were attached to his bill; that since 1877 he had claimed the words, devices, figures, and arrangements shown by said label as a trade-mark, especially employing the figures of two heads in an oval setting, and the words "Twin Brothers Improved Dry Hop Yeast," and "Twin Brothers" in connection with the yeast as a trade-mark; that the defendant Stratton and his brother Thomas J. Stratton were the two men represented by the two figures; that they originated the yeast, and were the original owners of the trade-mark; that defendant Jackson B. Stratton, before 1867, made and sold this yeast under the name of "Twin Brothers Improved Dry Hop Yeast" in the state of Ohio, and in 1867 complainant and said defendant Stratton formed a partnership and made and sold this yeast; that late in the year 1867 complainant bought out from said Stratton his interest in the partnership and trade-mark, paying therefor \$4,000; but he continued to employ Stratton, under various agreements, until the year 1877, in the manufacture of this yeast; that in 1869 he purchased from Thomas J. Stratton the factory theretofore leased from him, and his interest in the trade-mark, and had since continued to use the same, with the wrappers and labels, and particularly the term "Twin Brothers Yeast," both separately from and in connection with the bust figures shown upon the wrappers; that at the time of his purchase from the defendant the yeast was not extensively known, and the demand therefor was not large, but that since said purchase the business has been greatly extended and the demand for the yeast is now large and constant; that defendant Stratton and others were making a spurious

article and selling the same as "Twin Brothers Dry Hop Yeast," and using wrappers and labels like those of the plaintiff; that the spurious article is a fraud upon the public, who purchase it believing it to be the genuine Twin Brothers yeast made by the plaintiff.

Prayer: That the defendants be enjoined from imitating the label, and from selling any yeast made by them, or any other person than the plaintiff, as and for the "Twin Brothers" yeast, and in using the name of Twin Brothers in any way, shape, or form in connection with the sale of yeast.

The defendants claimed an absolute right to use the words "Twin Brothers Yeast," in so far as they constituted the original trade-mark of Stratton Brothers, on the ground that Stratton never sold his interest in such trade-mark to complainant; that a court of equity will not protect plaintiff in the use of his trade-mark, although he bought it of Stratton, because in using it he represents to the public that he was the originator, and that it indicates an origin in himself, when such is not the truth; that Twin Brothers is a generic name of a compound made under Stratton's discovery; and that the defendants or any other person making the genuine article may sell it under its proper name. They deny the charge that the yeast made by them is a spurious article, and claim that it is the genuine original compound discovered by defendant Stratton, and substantially the same as made by the complainant.

C. F. Burton and Alfred Russell, for plaintiff.

H. C. Wisner, for defendant.

BROWN, D. J. We think there is a decided preponderance of testimony in favor of the plaintiff's theory that at the time his partnership with the defendant Stratton was dissolved he purchased not only his interest in the business, but also his moiety of the trade-mark. Indeed, the defendant seems to have had very little else of any value to sell. Plaintiff had put but a thousand dollars into the venture. Defendant had contributed nothing but his attention and skill. The partnership lasted but eight or nine months, and the business done was very limited. They would get a little meal and make a small quantity of yeast; then they would shut up the factory and go out and sell it, get a little more meal, and start again. After conducting the business in this way about six months the demands of their creditors became so urgent that plaintiff was obliged to advance \$300 more to continue it. Soon after, an investigation of the books showed their affairs to be in such a precarious condition that defendant Stratton wanted to go out of the business, and the plaintiff bought

his interest and paid him \$4,000. At the time of the sale there appears to have been no stock on hand, and the factory had been shut down for some six weeks. Under these circumstances it seems to us quite improbable that they could have made ten or twelve thousand dollars in nine months, or that there could have been debts due the firm to the amount of \$8,000. Add to this the testimony of several witnesses who swear that defendant stated to them repeatedly, and in a regretful manner, that he had sold his interest in the trade-mark, and had nothing else to sell to the plaintiff, and his subsequent conduct after he left plaintiff's employ in commencing to sell under the name of the "Standard Yeast," we can entertain but little doubt of the fact, notwithstanding the agreement was not in writing.

The principal question involved in this case is whether the words "Twin Brothers" are a trade-mark of such a character as entitles the plaintiff to be protected in his monopoly of them. The point is certainly not free from difficulty. There are few classes of cases in the whole domain of the law so difficult to reconcile as those wherein the validity of a trade-mark is discussed. The following propositions, however, may be considered as settled:

1. That a court of equity will enjoin unlawful competition in trade by means of a simulated label, or of the appropriation of a name; as where the defendant appropriates the name of a hotel conducted by the plaintiff, or imitates his label upon preparations. *Howard v. Henriques*, 3 Sandf. 725, (*Irving House Case*;) *Woodward v. Lazar*, 21 Cal. 448, (*What-Cheer House Case*;) *Howe v. Searing*, 10 Abb. Pr. 264, (*Howe's Bakery Case*;) *McCardel v. Peck*, 28 How. Pr. 120, (*McCardel House Case*;) *Williams v. Johnson*, 2 Bosw. 1, (*Genuine Yankee Soap Case*;) *Day v. Croft*, (2 Beav. 488, (*Day & Martin Blacking Case*;) *Davis v. Kendall*, 2 R. I. 566, (*Pain-Killer Case*;) *Meriden Britannia Co. v. Parker*, 39 Conn. 450. The ground of interference in this class of cases is fraud; that is, the attempt to palm off the goods of the defendant as the goods of the plaintiff.

2. A court of equity will not protect a person in the exclusive use of a word which expresses a falsehood; as, if the article bears the word "patented" when in fact it is not patented, or exhibits an untruth as to the place of manufacture or composition of the article. *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. of L. 531; *Brown, Trade-Marks*, § 72; *Flavel v. Harrison*, 10 Hare, 467; *Partridge v. Menck*, 2 Barb. Ch. 101; *Pidding v. How*, 8 Simons, 477, (*Howqua Mixture Case*;) *Palmer v. Harris*, 60 Pa. 156, wherein the trade-mark indicated that certain cigars were made in Havana, when

in fact they were made in New York; *Fetridge v. Wells*, 13 How. Pr. 385, (*Balm of Thousand Flowers Case*;) *Phalon v. Wright*, 5 Phila. 464, (*Night-Blooming Cereus Case*;) *Cocks v. Chandler*, L. R. 11 Eq. 446, (*Reading Sauce Case*;) *Conwell v. Reed*, 128 Mass. 477, (*East Indian Remedy Case*.)

3. That no one can extend his monopoly of a patented trade-mark. By the expiration of the patent the public acquires the right not only to make and sell the article, but to make and sell it under the name used by the patentee. *Singer Manuf'g Co. v. Stanage*, 6 FED. REP. 279; *In re Richardson*, 3 O. G. 120; *Tucker Manuf'g Co. v. Boyington*, 9 O. G. 455.

4. A person cannot, by means of a trade-mark, monopolize the name of the place where the article is manufactured. *Canal Co. v. Clark*, 13 Wall. 311, (*Lackawanna Coal Case*;) *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416. Nor the ordinary numerals or letters. *Manuf'g Co. v. Trainer*, 101 U. S. 51; *A. C. A. Case*; *Am. Manuf'g Co. v. Spear*, 2 Sandf. 599; *Avery v. Meikle*, 23 Alb. Law. J. 443. This proposition, however, has been disputed. See *Gillott v. Estabrook*, 48 N. Y., (*The 303 Case*;) *Boardman v. Meriden Britannia Co.* 35 Conn. 402. Nor can a person monopolize a name expressive of the character or composition of an article. *Caswell v. Davis*, 35 N. Y. 281, (*Ferro-Phosphorated Elixir of Calisaya Bark Case*.)

5. So where the words used are expressive only of the name or quality of the article, and have acquired that significance in the market. *Am. Manuf'g Co. v. Spear*, 2 Sandf. 599; *Manuf'g Co. v. Trainer*, 101 U. S. 51; *Stokes v. Landgraff*, 17 Barb. 608; *Corwin v. Daly*, 7 Bosw. 222, (*Club House Gin Case*;) *Ferguson v. Davol Mills*, 2 Brewster, 314; *Choynski v. Cohen*, 39 Cal. 501, (*Antiquarian Book Store Case*;) *Phalon v. Wright*, 5 Phila. 464; *Singleton v. Bolton*, 3 Doug. 293, (*Case of Dr. Johnson's Yellow Ointment*;) *Thomson v. Winchester*, 19 Pick. 214, (*Thomsonian Medicine Case*;) *Benninger v. Wattles*, 24 How. Pr. 204, (*Old London Dock Gin Case*;) *Raggett v. Friedlater*, L. R. 17 Eq. 29, (*The Nourishing Stout Case*.)

In order that mere words may be upheld as a trade-mark they must be merely arbitrary, or they must indicate the origin or ownership of the article or fabric to which they are affixed. *Am. Manuf'g Co. v. Spear*, 2 Sandf. 597; *Canal Co. v. Clark*, 13 Wall. 322; *Falkinburg v. Lucy*, 35 Cal. 52; *Brown, Trade-Marks*, § 216; *Durham Tobacco Case*, 3 Hughes, 157; *Wotherspoon v. Currie*, L. R. 5 E. & I. App. 508, (*The Glenfield Starch Case*;) *Ford v. Foster*, L. R. 7 Ch. App. 611, (*Eureka Shirt Case*;) *Hier v. Abrahams*, 82 N. Y. 519,

(*Pride Tobacco Case*;) *McAndrew v. Bassett*, 10 Jur. (N. S.) 550; S. C. 12 Week. R. 777, (*Anatoleo Case*;) *Lee v. Haley*, L. R. 5 Ch. 155, (*Grimes Coal Co. Case*;) *Seixo v. Provezende*, L. R. 1 Ch. 192, (*Seixo Wine Case*;) *Braham v. Bustard*, 1 Hem. & M. 447, (*Excelsior Soap Case*.)

There are cases which appear to differ from those above cited, but we think most if not all of them, can be distinguished from them.

The defendant takes the ground in this case that the words "Twin Brothers Yeast" is a generic name, and indicates, not the origin or ownership of the article, but its specific quality, and that it has acquired in the market a reputation under that name. This defence appears to be somewhat of an after-thought, and it is doubtful whether it is properly before the court, since no allusion is made to it in the answer, and it was not until the case had been at issue a year and the proofs taken that defendant made an affidavit to the effect that "Twin Brothers Yeast" was the generic name of a specific article of merchandise, and that he was the only person who ever was or ever could be able to manufacture it. The defence, too, seems to be somewhat inconsistent with the previous testimony. Upon being called as a witness Stratton swore that he made a discovery of a yeast compound, and that he did not get it patented because he considered it of more value to him as a secret than as a patent. He had imparted the the secret to the employes of the plaintiff. He had also imparted it to the Judds, who manufactured "Judd Bros." yeast according to his formula; that he had also imparted the secret to one Hopper, who made the same yeast under the name of the "National Yeast;" that while a member of the firm of A. G. Smith & Co. he manufactured and sold the same yeast under the name of the "Standard" yeast; and that he manufactured the same yeast for a firm in Toledo, who sell it under the name of the "Lion Brand."

The difficulty is in distinguishing cases where the property has acquired a generic name, as indicating the quality of the article rather than its origin or ownership. One would say at once that Congress Water was an example of a generic name, since it is universally known by that name in the market; and yet the court of appeals in New York sustained it as a trade-mark, apparently upon the ground that complainants were the exclusive owners of the spring known as the Congress Spring, and that the right to use the name was passed as appurtenant to the property. The only satisfactory rule we have been able to gather from the authorities is that in each case it is a matter for the court to determine, not alone from the mark itself,

but from the testimony, whether the words have become so well known as to stand in the public eye as denoting the character and quality of the article and not its origin or ownership. Thus, if it should appear that the article had been manufactured and sold by a number of dealers under a particular name, this would be decisive that the plaintiff had no right to the exclusive use of that name. Most if not all of these generic names were at first indicative of the origin, but finally, by constant use, ceased to subserve that purpose and have become indicative of the quality. An example of this is "Fowler's Solution of Arsenic," which clearly indicates origin, but the article is nevertheless put up by druggists all over the country, and this name has become public property. We think that most if not all the cases upon this subject, when carefully examined will be found to have turned upon the extent to which the name is used, rather than upon the name itself. Thus, in the *A. C. A. Case*, 101 U. S. 51, it was said by the court that it was clear, from the history of the adoption of the letters as narrated by the complainant and the device itself, that they were only intended to represent the highest quality of ticking manufactured by the plaintiff, and not its origin. It appeared that other letters were used to indicate inferior grades of the same article.

In *Stokes v. Landgraff*, 17 Barb. 608, it appeared it was a practice of manufacturers of glass to designate the several qualities by names similar to those used by the parties to the action, and not by words or figures, in terms expressing the qualities. In *Corwin v. Daly*, 7 Bosw. 222, it appeared that the words "Club House" had been applied to articles of merchandise, including gin of a special quality, for a number of years. See, also, *Ferguson v. Davol Mills*, 2 Brewster, 314; *Thomson v. Winchester*, 19 Pick. 214; *Wollfe v. Goulard*, 18 How. Pr. 64, (*Scheidam Schnapps Case*.)

But if the primary object of the trade-mark be to indicate the origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to debar the owner of protection or make it the common property of the trade. To hold otherwise would be to deprive the owner of the exclusive use of his trade-mark just at the time when it had become most valuable to him and stood most in need of protection. But if the same be suffered to come into general use without objection from the original proprietor, it becomes merely generic, or indicative of quality.

Applying these principles to the case under consideration, it is pertinent to observe that no such defence is set up in either of the

answers to the original bill, which was filed in December, 1880. In the answer of Orange Judd it is expressly averred that he is manufacturing Judd Brothers yeast; that for a number of years he manufactured yeast for the complainant of precisely the same kind as he is now manufacturing, and which said complainant sold as Twin Brothers yeast. He admits that he is selling to said Jackson B. Stratton and Asa Judd the yeast manufactured by this defendant, which, as before stated, is precisely the same kind of yeast he before manufactured for the plaintiff. He further avers that what Stratton and Asa Judd (his brother) do with said yeast this defendant does not know except from hearsay, but he denies that he is directly or indirectly using the "Twin Brothers" trade-mark, or any mark except that owned by himself, to-wit, the trade-mark of Judd Brothers; and further, that if Stratton and Asa Judd are using complainant's trade-mark, it is upon their own responsibility and without any agency or authority from him. He further, in paragraph 6, says that he is now and has been selling to the trade large quantities of the same kind of yeast which he has been selling said defendants Stratton and Asa Judd; that all said yeast sold by him is sold under the name of "Judd Brothers Yeast." The testimony also shows, as heretofore stated, that the same yeast was sold under the name of Standard yeast and of the Lion yeast.

The first intimation we have of the claim now set up is contained in the affidavit of Jackson B. Stratton, filed in December, 1881. His original defence was that he did not sell his interest in the trade-mark. It is true that in several of the contracts entered into between the plaintiff and defendant Stratton the yeast is spoken of as the Twin Brothers yeast, and sometimes of the "kind and quality" known as Twin Brothers yeast; and so it was undoubtedly known, as between the parties themselves, as representing the yeast of the compound of which Stratton possessed the secret; but this is no answer to the fact that it was manufactured and held out to the public under different names, such as were most convenient for Stratton. Upon the whole, it does not seem to us that the words "Twin Brothers," under the testimony, can be considered as indicating to the public the quality of the yeast, though it certainly does indicate origin and ownership in the persons whose likenesses appear on the trade-mark. The question whether this trade-mark was such a one as could be the subject of assignment to the plaintiff, and lawfully used by him, is not free from difficulty. He was not one of the Twin Brothers, nor are either of the heads in the oval figure representations of himself or of any

one now connected with him in business. But the cases are numerous in which it has been held that a party may lawfully assign and sell not only a trade-mark indicative of origin in himself, but even the right to use his own name in connection with a particular business. Several of these are cited in the recent opinion of Mr. Justice Matthews in the case of *Pepper v. Labrot*, 8 FED. REP. 29, in which the right to use the words "Old Oscar Pepper" were held to pass to an assignee in bankruptcy of the proprietor of a distillery and premises, even as against such former proprietor himself, who had set up a separate establishment in another county. The comments of Justice Field in this connection in *Kidd v. Johnson*, 100 U. S. 617, are decisive of the right of a party to sell a trade-mark used in connection with a certain business, though it be indicative of origin in himself. In the case under consideration it seems to me clear that the Strattons could lawfully transfer to the complainant, in connection with their sale to him of their interest in the business, the exclusive right to use their trade-mark. Whether such trade-mark could be assigned separate from the business to which it was appurtenant, or whether it would pass by a sale of the business alone, we are not called upon to decide. Complainant paid a valuable consideration for this trade-mark, and we think he should be protected by injunction in his right to use it.

See *Shaw Stocking Co. v. Mack*, *post*, 707, and note, 717.

NOTE.

TRADE-MARK. A trade-mark may consist of a word, expression, device, or mark adopted as such, but not words belonging to the general public, which describe truly a known product. (a) A compound word coined by a person is entitled to protection, as "electro-silicon." (b) Property may be acquired in the use of the translation of a foreign word, (c) as "conserves alimentaires," with the coat of arms of the city of Paris; (d) or the word "Bismarck," used to designate a particular style of goods; (e) or "Bethesda," adopted to indicate origin or ownership; (f) or the word "Eureka;" (g) but words or phrases in common use (h) cannot be appropriated as a trade mark, as "desiccated codfish;" (i) as "snow-flake," applied to bread and crackers; (j) "straight cut," "curly cut,"

(a) *Helmhold v. Helmhold Manufg Co.* 53 How. Pr. 453.

(b) *Electro-Silicon Co. v. Trask*, 59 How. Pr. 189; *Same v. Levy*, *Id.* 469; or "ferro-phosphorated," *Caswell v. Davis*, 35 How. Pr. 76.

(c) *Rillett v. Carlier*, 61 Barb. 435.

(d) *Godillot v. Hazard*, 44 N. Y. Super. 427.

(e) *Messerole v. Tynberg*, 4 Abb. Pr. (N. S.) 410.

(f) *Dunbar v. Glenn*, 42 Wis. 118.

(g) *Allegheny Fertil. Co. v. Woodside*, 1 Hughes, 115.

(h) *Town v. Stetson*, 3 Daly, 53; *Choynski v. Cohens*, 39 Cal. 501; *Caswell v. Davis*, 58 N. Y. 223; *Burke v. Cassin*, 45 Cal. 467; *Marshall v. Pinkham*, 52 Wis. 572.

(i) *Town v. Stetson*, 3 Daly, 53; *S. C. 5 Abb. Pr. (N. S.)* 218.

(j) *Larabee v. Lewis*, 25 Alb. L. J. 203.

"short cut," as applied to cigarettes;(k) or "cherry pectoral;"(l) or "iron clad" applied to boots; or "gold medal"(m) or "Club House," applied to gin to indicate quality.(n) So words commonly used in any language cannot be specially appropriated, as "schnapps," used to designate gin.(o) The appropriation and use for many years of the word "royal" as a trade-mark is entitled to protection;(p) so of "Old London Dock Gin," in connection with a certain style of bottle and label;(q) so of "The Heroine" stamped on the glass;(r) so of "Magnetic Balm" upon a manufactured medicine;(s) and so of "Keystone Line," acquired by many years' possession.(t) The exclusive right to the use of the word "Durham" recognized.(u) The use of a word tending to deceive the public cannot be tolerated;(v) and equity will not protect a person in the use of a false or deceptive trade-mark;(w) nor where the party is attempting to deceive the public.(x) A fraudulent and deceptive trade-mark is not to be protected by injunction; yet that it bears a fictitious name does not affect the owner's right where it is not used with a fraudulent intent.(y)

Names and devices adapted to point out the true source and origin of a manufactured article may be adopted as a trade-mark(z) if it is used to designate origin or ownership, but never when used to designate the article itself,(a) unless it may be a product of nature, such as mineral water obtained from a spring, as "congress water" and "congress spring water."(b) The name of a place where a particular business is carried on will not be protected from invasion;(c) so "Mammoth Wardrobe" as the designation of a place will not be protected.(d) The name of an inventor, discoverer, or manufacturer may be employed as part of a trade-mark, as "Dr. J. M. Lindsey's Improved Blood Searcher,"(e) "Dr. J. Blackman's Genuine Healing Balsam,"(f) the "Roger William Long Cloth."(g) A person may use his own name for a trade-mark unless it leads to deceiving the public;(h) but to entitle him to protection his right to its use must be exclusive, and not a name which others may employ with as much truth as he who uses it.(i) The mere name of a person does not form a proper subject for a trade-mark,

(k) *Ginter v. Kinney Tobacco Co.* 12 Fed. Rep. post.

(l) *Ayer v. Rushton*, 7 Daly, 9.

(m) *Hecht v. Porter*, 6 Pac. C. L. J. 569.

(n) *Taylor v. Gillies*, 59 N. Y. 331.

(o) *Wolfe v. Goulard*, 13 How. Pr. 64.

(p) *Royal B. P. Co. v. Sherrill*, 59 How. Pr. 17.

(q) *Blininger v. Wattles*, 28 How. Pr. 206.

(r) *Rowley v. Houghton*, 2 Brewst. 303.

(s) *Smith v. Sixbury*, 25 Hun, 232. See *Connell v. Reed*, 128 Mass. 477.

(t) *Winsor v. Clyde*, 9 Phila. 513.

(u) *Blackwell v. Dibrell*, 3 Hughes, 151.

(v) *Ginter v. Kinney Tobacco Co.* 12 Fed. Rep. post.

(w) *Hennessy v. Wheeler*, 51 How. Pr. 457; *Seabury v. Grosvenor*, 53 How. Pr. 192; *Helmhold v. Helmhold Manufg Co.* Id. 453; *Laird v. Wilder*, 9 Bush, 131.

(x) *Palmer v. Harris*, 60 Pa. St. 156. See *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321.

(y) *Dale v. Smithson*, 12 Abb. Pr. 237; *Stewart v. Smithson*, 1 Hilt. 119.

(z) *Filley v. Fassett*, 44 Mo. 168. See *Ferguson v. Davol Mills*, 2 Brewst. 314; *Dixon Crucible Co. v. Guggenheim*, Id. 321.

(a) *Pettridge v. Wells*, 4 Abb. Pr. 144; *Marshall v. Pinkham*, 52 Wis. 572.

(b) *Congress, etc., Spring Co. v. High Lock, etc., Spring Co.* 45 N. Y. 291.

(c) *Glen, etc., Manufg Co. v. Hall*, 61 N. Y. 226. See *Newman v. Alvord*, 49 Barb. 588; *Peper v. Labrot*, 8 Fed. Rep. 29.

(d) *Gray v. Koch*, 2 Mich. N. P. 119.

(e) *Fulton v. Sellers*, 4 Brewst. 42.

(f) *Filkins v. Blackman*, 13 Blatchf. 440.

(g) *Barrows v. Knight*, 6 R. I. 434.

(h) *England v. N. Y. Publishing Co.* 8 Daly, 375.

(i) *Canal Co. v. Clark*, 13 Wall. 311; *Meneeley v. Meneeley*, 62 N. Y. 427.

although it appears that such name, by long association with a certain line of goods, has come to be applied as a name or title to such goods.(j) A manufacturer may label his goods with his own name or that of his mill, if no fraudulent purpose is intended.(k) So a corporation name may be protected,(l) and a trade name of a firm will be protected(m) and may be assigned to a successor, who has the same right of protection(n) and the right to its exclusive use.(o) The proprietary right to the name of a newspaper will be protected, (p) as "The American Grocer;"(q) but the mere assimilation of the name, unless clearly calculated to deceive, would not be a violation.(r) Geographical names are not generally capable of specific appropriation,(s) as "Lackawanna Coal," "Scranton Coal," "Pittston Coal,"(t) "Worcestershire Sauce,"(u) So of the name of the town or city;(v) but where the name of the village has been used by a manufactory for a number of years as a trade-mark it will be protected as against new-comers.(w)

Although there is no property in a trade-mark as a mere abstract right, a property therein will pass by assignment or operation of law.(x) Where a trade-mark is used to designate the place where and the person by whom the goods are made, the right passes to the purchaser on a transfer of the business; but the mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership.(y) Where a firm made an assignment for the benefit of creditors of "all property and effects of every nature and description," the good-will of the business and the right to the use of the firm name and the trade-marks passed to the purchaser from the assignees.(z) A trade name of a firm is property, which may be assigned to a successor, who thereby obtains the same right to protection in its use as the original firm;(a) but whether a trade-mark will pass under a general assignment, *quære*.(b) A sale of the spring carries to the purchaser the right to the use of the trade-mark for the water of such spring.(c) The transfer of wood cuts of a trade-mark for a specific purpose gives no right to the trade-mark after such purpose is accomplished;(d) but an absolute assignment of a trade-mark gives the the right to exclusive use.(e)—[Ed.

(j) Ex parte Fairchild, 21 O. G. 789. See Marshall v. Pinkham, 52 Wis. 572.

(k) Amoskeag Manuf'g Co. v. Garner, 54 How. Pr. 297; Gillott v. Esterbrook, 48 N. Y. 374; Shaver v. Shaver, 54 Iowa, 208.

(l) Gillott v. Esterbrook, 48 N. Y. 374.

(m) Carmichael v. Latimer, 11 R. I. 395.

(n) Howard v. Park, 21 Hun, 618; Congress, etc., Spring Co. v. High Rock, etc., Spring Co. 10 Abb. Pr. (N. S.) 348.

(o) Blackwell v. Dibrell, 3 Hughes, 151.

(p) Matsell v. Flanagan, 2 Abb. Pr. (N. S.) 459; Stephens v. De Conto, 4 Abb. Pr. (N. S.) 47; Bell v. Locke, 8 Paige, 75.

(q) Am. Grocer v. Grocer Pub. Co. 25 Hun, 398.

(r) Stephens v. De Conto, 7 Robt. 343; 4 Abb. Pr. (N. S.) 47; Marshall v. Pinkham, 52 Wis. 572.

(s) Lea v. Wolf, 46 How. Pr. 157; Canal Co. v. Clark, 13 Wall. 311.

(t) Canal Co. v. Clark, 13 Wall. 311.

(u) Lea v. Wolf, 13 Abb. Pr. (N. S.) 391.

(v) Glendon Iron Co. v. Uhler, 75 Pa. St. 467.

(w) Newman v. Alvord, 51 N. Y. 159.

(x) Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321.

(y) Witthaus v. Mattfeldt, 44 Md. 303.

(z) Hegeman v. Hegeman, 8 Daly, 1.

(a) Howard v. Park, 21 Hun, 618.

(b) Milliken v. Williams, 26 Hun, 24.

(c) Congress, etc., Spring Co. v. High Rock, etc., Co. 10 Abb. Pr. (N. S.) 348.

(d) Lockwood v. Bostwick, 2 Daly, 521.

(e) Blackwell v. Dibrell, 3 Hughes, 151.

SHAW STOCKING Co. v. MACK and another.

(Circuit Court, N. D. New York. June, 1882.)

1. TRADE-MARK DEFINED—OBJECT AND PURPOSES OF.

A trade-mark is a mark by which the wares of the owner are known in trade; its object being—*First*, to protect the party using it from competition with inferior manufactures; and, *second*, to protect the public from imposition.

2. SAME—OF WHAT MAY CONSIST.

The trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, and figures may be used, and numerals united.

3. SAME—NUMERALS—INFRINGEMENT.

Where numerals constituted one of the most prominent features in plaintiff's design, and the same numerals were used in a similar design by defendants, such use, when adopted to designate the same kind of articles, is calculated to aid in deceiving the public, and is an infringement of plaintiff's trade-mark.

4. SAME—SIMILITUDE.

It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not the imitation; and it is not necessary that the resemblance should be such as would mislead an expert, or such as would not be easily detected if the original and spurious were seen together.

5. SAME—RIGHT TO USE OF TRADE-MARK.

The right to a trade-mark is a right depending on use; and where complainant had used certain numerals long enough to convey to any one versed in the nomenclature of the trade a precise understanding of what goods were intended, when such numerals were used alone, disconnected from any extrinsic information, its right to their exclusive use as a trade-mark must be upheld.

6. SAME—PROTECTION BY INJUNCTION.

An injunction will be granted to restrain the defendants from using the numerals appropriated by plaintiff, to designate the same kind of goods sold by the defendants and not made by the plaintiff, and from using on their labels a word printed in script, with a flourish underneath, in imitation of a word used by the plaintiff on its labels.

Miller & Fincke, for complainant. *John L. S. Roberts*, of counsel.

Thomas Wilkinson, for defendants. *E. Countryman*, of counsel.

COXE, D. J. The Shaw Stocking Company is alleged to be a corporation engaged in the manufacture and sale of hosiery at Lowell, Massachusetts. Its goods differ in some important respects from the productions of other manufacturers, and have by virtue of their inherent worth acquired a wide-spread reputation and popularity. The complainant, with perhaps a pardonable assurance, insists that these goods possess many excellent and novel qualities and characteristics hitherto unknown or unapplied. It is not disputed, however, that in some respects the assertion is well founded. The defendants ap-

parently entertained a very high opinion of the complainant's hosiery, for as late as April 19, 1882, they wrote as follows: "Now, since you have determined you will not give us further supplies, * * * we do not care to continue our hosiery trade at all. * * * We want the best make or none," etc.

Upon the question of quality it is sufficient to say that no one of the affiants produced by the defendants alleges that there are goods in the market superior to the complainant's. Some are said to be equal, none superior. For a period of two years complainant's hosiery has been packed and sold in boxes, to which were attached labels in the following form:



The central compartment of the label was the same in every instance, without reference to the contents of the boxes. The figures at either end differed according to the style and size of the hosiery, the numerals "830" having long been used by complainant to designate seamless half-hose of a mottled drab color manufactured by it. Half-hose of this particular variety had been advertised by these numerals, were known to the trade as "830's," and as such had become popular as the wares of complainant.

In May, 1881, complainant commenced selling to the defendants' firm at Albany large quantities of its goods. At the request and solicitation of defendants, complainant sent them several thousand circulars or price-lists, signed by the Shaw Stocking Company, and containing the announcement that the wares manufactured by that company and described in the circular could be obtained of "Mack & Co.," who would supply them to buyers at the prices indicated. These circulars were sent by the defendants extensively to their customers throughout the state, it being generally understood that the "Shawknit" goods could be obtained as favorably at Albany as at Lowell. The statements contained in the circular, emanating as it did directly from the company, taken in connection with the fact

that the defendants advertised themselves on their bill-heads as "manufacturers and manufacturers' agents," caused it to be commonly supposed that Mack & Co. were the New York agents of the complainant, or at least conveyed information from which such an inference could reasonably and properly be drawn by the commercial world. In March, 1882, the defendants having maintained this connection with the complainant for nearly a year, and having a large quantity of its hosiery undisposed of, commenced putting up and selling, without previous notice, other goods, similar in color and texture, but inferior in many respects to its productions, as complainant insists, and lighter in weight and cheaper in price, as defendants admit. These goods were sold under labels like the following:



The wares so labelled and sold were not manufactured by the defendants, but were purchased of stocking makers at Birmingham, Connecticut, the labels on the boxes being removed by the defendants and the above labels substituted, not only on the Birmingham, but also on the "Shawknit" boxes.

Defendants' own account of their action in this regard, and of the motives which prompted it, is stated under date of April 11, 1882, in the following words:

"This state of affairs [viz., the alleged withdrawal of styles by the complainant] was the first incentive to using Birmingham hose, and our idea was to work the two makes together in such a way as to save us from loss on yours, which were the higher cost, and at the same time in such a manner that any variations from your regular prices would not reflect on you, or become detrimental to your interests in any manner, and, at the same time, enable us, on an average cost, to make something; and consequently we had our labels printed and our own bands, putting them on all,—your make and Birmingham both,—making no claim as to any particular or distinctive manufacture, only retaining in the label the number adopted by you to distinguish style," etc.

This letter was written after notice of complainant's grievance, and it is fair to assume that it contained as favorable a presentation of defendants' case, and their motives and intentions, as at that time suggested itself to the mind of the letter-writer.

The foregoing facts are in their essential features undisputed.

The complainant also produced affidavits tending to show that many dealers had been deceived by the defendants' labels; that "Shawknit" goods had been ordered and paid for as such, and the Birmingham goods supplied by defendants in response to such orders; that defendants' agents sold by "Shawknit" samples, but the orders were not filled with "Shawknit" goods.

The defendants deny that they have been guilty of any attempt to deceive the public, and offer an explanation of the various occurrences relied on by the complainant to establish a fraudulent intent. They also produce a number of affidavits intended to establish two or three leading propositions, viz: That the Birmingham is not inferior to the "Shawknit" hosiery; that the numerals used by complainant are intended simply and solely to designate the quality and style of its goods, and not for the purpose of indicating their origin or identifying their makers; that the two labels are so dissimilar that no one, exercising ordinary care, would be misled.

Defendants also produce an affidavit made by one of their agents, in which the affiant states that on the first day of June, 1882, he visited the city of New York, and in five stores there, found seamless half-hose made by different manufacturers, the quality being distinguished by the numerals "830." He fails, however, to give the name of any of the manufacturers, the date when the figures were first used, or any data upon which the complainant could base an investigation.

The question to which the attention of counsel was chiefly devoted on the argument was whether the complainant had an exclusive right to the number "830" to designate and distinguish its hose of a particular variety.

Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is twofold: *First*, to protect the party using it from competition with inferior articles; and, *second*, to protect the public from imposition. There is hardly a limit to the devices that may be thus employed; the whole material universe is open to the enterprising merchant or manufacturer. Anything which can serve to distinguish one man's productions from

those of another may be used. The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. The trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, and figures may be used. Why not numerals united? What consistency is there in allowing it in a combination of letters, but denying it in a combination of figures?

A careful examination of the authorities cited by the learned counsel for the defendants leads to the conclusion that where the courts have refused protection to alleged trade-marks composed of letters or numerals, it has been because on the facts of each case, it was determined that the figures or letters were intended solely to indicate quality, etc., and not because figures and letters in arbitrary combination are incapable of being used as trade-marks. It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3, and 4, or the letters A, B, C, and D, to distinguish the first, second, third and fourth quality of his goods, respectively. Why? Because the general signification and common use of these letters and figures are such, that no man is permitted to assign a personal and private meaning to that which has by long usage and universal acceptance acquired a public and generic meaning. It is equally clear, however, that if for a long period of time he had used the same figures in combination, as "3214," to distinguish his own goods from those of others, so that the public had come to know them by these numerals, he would be protected. The courts of last resort in Connecticut, in Massachusetts, and in New York have distinctly held that doctrine. *Boardman v. Meriden*, 35 Conn. 402; *Lawrence Co. v. Lowell Mills*, 129 Mass. 325; and *Gillott v. Esterbrook*, 48 N. Y. 374,—the numerals sustained being respectively "2340," "523," and "303." The defendants concede this, but insist that the case of *Manufacturing Co. v. Trainer*, 101 U. S. 51, affirms a contrary doctrine, and that it should be controlling. Undoubtedly the decisions of the supreme court should be followed, but I do not understand the doctrine enunciated by the court in this case as conflicting with the general principle contended for by the complainant. The case appears to have been decided upon the theory that the letters "A, C, A" were simply used to denote quality and not origin, and turned mainly upon the question of fact as to whether or not they were so used. Upon this question the court was divided. Mr. Justice Field, who delivered the prevailing opinion says, at page 54: "The object of the trade-mark is to in-

dicare, either by its own meaning or by association, the origin or ownership of the article to which it is applied." And at page 55: "It is clear from the history of the adoption of the letters 'A, C, A,' as narrated by the complainant, and the device within which they are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant, *and not its origin*;"—hence Mr. Justice Field's decision. Mr. Justice Clifford, in an able opinion, dissented, and directly antagonizing the foregoing interpretation of the evidence, says, at page 59: "Attempt is made in argument to show that the symbol of the complainants was not adopted by them for any other purpose than to designate the grade or quality of the fabric which they manufacture and sell in the market; but it is a sufficient answer to that proposition to say that it is *wholly unsupported by evidence, and is decisively overthrown by the proof introduced by the complainants*;"—hence Mr. Justice Clifford's dissent. Had the evidence been understood by the two justices alike, there is no reason to believe that there would have been any disagreement as to the law.

Subsequent to the decision of the supreme court in the *Trainer Case*, and with full knowledge thereof, the case of the *Lawrence Co. v. Lowell Mills*, *supra*, was decided by the supreme court of Massachusetts. There is a striking resemblance between that case and the case at bar. Rarely is there such a similarity between the facts of two cases wholly separate and distinct. The trade-mark in the Massachusetts case consisted of an eagle surmounting a wreath formed of the branches of the cotton plant. Inside the wreath, and printed in a circle, were the words "Lawrence Manufacturing Company;" underneath it the word "trade-mark;" and below all the figures "523." As in the case at bar, the word "trade-mark" does not appear to have had any connection with the numerals. It was attached to and connected with the vignette. The figures were below and separated from it. This device had been used to designate hosiery of a certain grade for many years, and was known and recognized as indicating that the goods so marked were of the plaintiff's manufacture. Other numerals, and in fact another device, had, prior thereto, been used to indicate the same grade of hosiery. The wreath and eagle, without the figures "523," or any figures, had also been used on other grades of goods. Defendants' device was an eagle surmounting a double circle or garter, on which were the printed words "extra-finish iron frame," and beneath were the fig-

ures "523" in the same relative position. The eagle and garter were used by defendant before the eagle and wreath were used by plaintiff, and plaintiff made no claim to them disconnected from the figures. The court, after referring to and considering the *Trainer Case*, and other cases, proceeds to say:

"These considerations would be decisive, if the plaintiff here claimed the exclusive right to the numerals '523,' when used only to indicate the quality, and not with reference to the origin, of the goods. But such is not the plaintiff's position. Its claim is that the purpose of using these figures in connection with the other parts of its trade-mark was to aid the buyer in distinguishing its goods from similar goods made and sold by others."

This is precisely the position of the complainant here, and could hardly have been stated more tersely. In that case the goods were known and described as "523's;" in this as "830's." Again, the court says

"The defendant's imitation was produced by using the same figures, printed in the same style, and placed as to the other parts of the device in the same relative position as the plaintiff's. These numerals constituted one of the most prominent features in the plaintiff's design, and, when used in connection with the rest of the defendant's mark were calculated to aid in deceiving the public. It is not necessary that the resemblance produced should be such as would mislead an expert, nor such as would not be easily detected if the original and the spurious were seen together. It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not an imitation."

I understand this case as holding distinctly that a party who has adopted an arbitrary combination of figures to designate his wares, and to distinguish them from the productions of others, is entitled to protection in the use of those figures. I am unable to see any difference in principle between it and the case at bar, and, as the latest adjudication directly upon this subject, I think it should be controlling.

That the facts in the case at bar bring it directly within the doctrine declared in the Massachusetts case, I have no doubt. The complainant, through its officers, explicitly states that the figures were adopted to distinguish its wares from those of other manufacturers, and it is difficult to perceive why such a number, "830," was chosen, unless some such object was in view. If the design had simply been what the defendants insist it was, the figures 1, 2, 3, etc., would have suggested a more convenient and less perplexing method than the one actually adopted.

It was the intention of the complainant to have its goods known in the market by these numerals; they were, in reality, so known. Not only is the fact sworn to in the complaint, but it is admitted in the answer at folio 22: the allegation being in the following language:

"And these defendants, further answering, severally say that they have been informed, and believe it to be true, and therefore admit, that such 'Shawknit' seamless half-hose of a mottled-drab color have been more generally known, called, and spoken of as '830's' by dealers in hosiery than by any other name, and that under that designation such hose have sometimes been ordered, purchased, and sold."

A very persuasive piece of evidence is found in an order produced by defendants, forwarded to them by their agent, in which these goods are described simply as "830, 2 doz.," and in a bill, also produced by defendants, the same goods are charged to one of their customers as "2 doz. hose, 830, 2.40, \$4.80."

The right to use a trade-mark is one depending upon use, and it appears that complainant had used these numerals long enough to convey to any one versed in the nomenclature of the trade a precise understanding of what goods were intended when the numerals were used alone, disconnected from any extrinsic information.

I must hold, then, that the complainant has a right to the exclusive use on its labels of the numerals "830" as applied to hosiery of a mottled-drab color. Regarding the word "Shawknit," printed in script letters, there is no denial of complainant's exclusive right.

The question that now remains to be considered is whether or not the defendants have infringed and invaded the rights and privileges of the complainant in such a manner as to call for interference of a court of equity. The intimate relations which had existed between complainant and defendants warranted the assumption on the part of the business community that the defendants were the agents of the Shaw Company, and could furnish the wares of that company upon terms as advantageous in every respect as the company itself. A merchant ordering "Shawknit" goods, or "830's," from the Macks, would be less likely to scrutinize them with care, and more likely to accept them without thorough inspection, than if the same goods had been ordered from some irresponsible house. The seal of genuineness had been set on the goods furnished by Mack & Co. by the indorsement which the complainant had given them. Suspicion was disarmed, confidence invited.

In these circumstances, the defendants, having on hand a large stock of the complainant's hosiery, purchased goods cheaper, and certainly not superior, from a rival manufacturer, removed the maker's labels from both, and substituted therefor the label originated by themselves. They must have had some motive in doing this. What was it? The explanation in the letter of April 11th, that they wanted to find a substitute for complainant's retired stock, is hardly satisfactory, so far as the goods involved in this action are concerned; for in the last price list issued by complainant April 7, 1882, is found "830, mottled drab, 2.40," still in stock. If the defendants intended to derive no benefit from the known reputation of the "Shawknit" goods—if they intended to sell the Birmingham goods solely on their merits—why would not some other number than 830 have suited them as well?

As is said by Judge Lowell in *Rogers v. Rogers*, 11 FED. REP. 495: "The reason that artificial trade-marks are absolutely protected, without inquiry into motives, etc., is that the defendant has no natural right to such a symbol, and has the world of nature from which to choose his own." Is it not clear that defendants, occupying the relation they did to the complainant, by using the number "830" in connection with the word "seamless" placed in the same relative position, printed in the same script, and with the identical flourish as the word "Shawknit," are in a position where, even though intending no wrong, their acts may work injury to the complainant? Are they not within the prohibition of the law, stated in such homely but vigorous language in *Levy v. Walker*, L. R. 10 Ch. D. 447:

"It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by fraudulent mis-statement, deprive me of the profits of the business which would otherwise come to me.'"

It is well settled that one man has no right to sell his goods as those of another. Whether the converse of this proposition is also true—that a man has no right to sell another's goods as his own—it is unnecessary to decide in this case, as the question has not been discussed; and yet, according to defendants' version of the transaction, complainant's hosiery was sold by them as their own. It seems

to me that, irrespective of the question relating to the technical infringement of complainant's trade-mark, the defendants are in a position where they have gained, or may gain, an unlawful advantage in trade by means of a simulated label. It is hardly necessary to cite authorities where the courts have interfered for the protection of the injured in such cases.

In *Fleischmann v. Schuckman*, 62 How. Pr. 92, the defendant was restrained from using the word "Vienna," as applied to bread, because the plaintiff had built up a business by so using it.

In *Hier v. Abrahams*, 82 N. Y. 519, defendants, using the words "Pride of Syracuse," were enjoined, the plaintiff using the words "Hier and Aldrich's Pride."

Also the following: *Knott v. Morgan*, 2 Keene, 213; *Edelsten v. Edelsten*, 1 De G., J. & S. 185; *Colman v. Crump*, 70 N. Y. 573; *Williams v. Spence*, 25 How. Pr. 366.

I am therefore compelled to say, after carefully examining the evidence, and the elaborate briefs submitted, that in my judgment there is such a simulation as will probably deceive the complainant's customers. Great damage might result to the complainant by the continuance of defendants' label. I fail to see, however, how the defendants can be materially injured by its disuse. They are not manufacturers of hosiery, but are simply selling the productions of others. What legitimate profits can they lose by selling the goods as they come from the manufactory with the original labels attached?

I think an injunction should issue restraining the defendants from using the numerals "830" to designate mottled-drab hose not made by complainant, and from using on their labels the word "seamless" printed in script, with the flourish underneath in imitation of the word "Shawknit," as used by complainant.

Motion granted.

See *Burton v. Stratton*, *ante*, 696, and note.

NOTE.

TRADE-MARK. A trade-mark may consist of anything—marks, forms, words, signs, symbols, or devices—designating origin or ownership, but not anything merely denoting name or quality; *(a)* and a manufacturer may by priority of appropriation acquire a property therein as a trade-mark. *(b)* All the essential requisites to the right of protection of law arises from prior use of the device which has created a celebrity or value for the article; *(c)* and the mark or device should be annexed to or stamped, printed, carved, or engraved upon the article; *(d)* and when stamped upon the articles manufactured by him he is entitled to its exclusive use. *(e)* It must be such a mark as will identify the article to which it is affixed. *(f)* So the omission to put the advertising name "Moline plow" on their plows divests the company of its exclusive right to the use of "Moline." *(g)*

One may appropriate an arbitrary number as a valid trade-mark, although not using it in connection with any word signifying ownership. *(h)* Letters or figures affixed to merchandise for the purpose of denoting its quality only cannot be appropriated; *(i)* but the words on labels "established 1780," which had been long used, were held entitled to protection. *(j)* So injunction was granted to restrain the use of the trade-mark "The * Shirt," *(k)* or the symbol $\frac{1}{2}$ printed in a special or unusual manner, *(l)* or numerals associated with words, as "303" with words "Joseph Gillott, extra fine." *(m)* A street number may be appropriated by one who has exclusive use of the building. *(n)*

SIMILITUDE. Putting up goods with an infringing mark will render the party so doing liable, *(aa)* as the use of similar packages with the same words and figures embossed thereon. *(bb)* The peculiar style of the package in which the article is put up, and the combination constituting the label, is protected; *(cc)* as the use of a barrel with a red rim and glazed head, with the letters AAA and a Maltese cross. *(dd)* Any labels, devices, or hand-bills calculated to deceive the public into the belief that the article is the same as that made and sold by the plaintiff is an infringement. *(ee)* In all cases the essence of the wrong consists in the sale of the goods of one person as those of another, *(ff)* and the true inquiry is whether the marks or symbols actually deceive the public. *(gg)* Simulated labels, marks, *indicia*, or advertisements

(a) Godillot v. Hazard, 49 How. Pr. 5; Ferguson v. Davol Mills, 2 Brewst. 314.

(b) Stokes v. Landgraaf, 17 Barb. 608; Robertson v. Berry, 50 Md. 591; Trade-Mark Cases, 100 U. S. 82.

(c) Messerole v. Tynberg, 36 How Pr. 141.

(d) St. Louis Piano Manufg Co. v. Merkel, 1 Mo. App. 305.

(e) Taylor v. Carpenter, 11 Paige, 292.

(f) Phalon v. Wright, 5 Phila. 464.

(g) Candee v. Deere, 54 Ill. 439.

(h) Collins v. Reynolds Card Manufg Co. 7 Abb. N. C. 17; India Rubber Co. v. Rubber, etc., Co. 45 N. Y. Super. 258; Lawrence Manufg Co. v. Lowell H. Co. 129 Mass. 125.

(i) Amoskeag Manufg Co. v. Trainer, 101 U. S. 51; Sohl v. Gelsendorf, 1 Wils. (Ind.) 60.

(j) Hazard v. Caswell, 57 How. Pr. 1.

(k) Morrison v. Case, 9 Blatchf. 548.

(l) Kinney v. Allen, 1 Hughes, 106.

(m) Gillott v. Esterbrook, 48 N. Y. 374; 47 Barb. 455; Same v. Kettle, 3 Duer, 624.

(n) Glen, etc., Co. v. Hall, 6 Lana. 158. But the use of IXL as a sign was refused protection. Lichtenstein v. Mellis, 2 Or. 464.

(aa) Sawyer v. Kellogg, 13 Rep. 106.

(bb) Frese v. Bachof, 14 Blatchf. 432.

(cc) Cook v. Starkweather, 13 Abb. Pr. 393; Lea v. Wolf, Id. 391.

(dd) Cook v. Starkweather, 13 Abb. Pr. 392.

(ee) Williams v. Spence, 25 How. Pr. 366.

(ff) Amoskeag Manufg Co. v. Spear, 2 Sandr. 599; Samuel v. Berger, 4 Abb. Pr. 68.

(gg) Blackwell v. Wright, 73 N. C. 10.

such as would ordinarily deceive customers, will be enjoined; (*h*) or where the imitation would have the effect to pass the goods as those of another with any one but the most cautious; (*i*) or where the resemblance would raise the probability of mistake on the part of the public. (*j*) The words, letters, figures, lines, and devices on a label must be so similar that any person, with such reasonable observation as the public generally are capable of, would mistake the goods for those of the other. (*k*) The imitation need not be exact and complete; (*l*) it is sufficient if it is likely to deceive or mislead (*m*) an ordinary purchaser. (*n*) The resemblance must amount to a false representation liable to deceive, (*o*) or if it is so close that a crafty vendor may palm off on the buyer the article manufactured as that of the other. (*p*) If the general effect is to mislead an ordinary person it is sufficient, (*q*) or if calculated to mislead the public, though the distinction between the imitation and the original would at once be seen on a slight or casual examination. (*r*) If it is a colorable representation of plaintiff's label, calculated to produce in the mind of the purchaser the impression that the goods were manufactured or sold by the person whose trade-mark was imitated, it is sufficient. (*s*) A colorable imitation will be enjoined where it requires careful inspection to distinguish it from the original, (*t*) and a substantial similarity is sufficient; (*u*) or where the difference would not be noticed when seen at different times and places. (*v*) An imitation with partial differences, such as the public would not observe, (*w*) or which would not be perceived without strict examination, will not protect it from injunction (*x*) and should be disregarded; (*y*) but if the alleged imitation has not deceived an ordinary purchaser an injunction will not be granted. (*z*) Where the name of the imitator was substituted in a label, and the imitation in other respects not exact, yet so great that a purchaser, who did not read the name, might be deceived, it is a violation of the trade-mark. (*a*) So the use of the word "Apollinis" on a label, in connection with a representation of a bow and arrow or anchor, was restrained on account of similarity to the word "Apollinaris" with the representation of an anchor. (*b*) An article of the same kind, called "Saphia," put up in similar wrappers as the article called "Sapolio," the imitation being intended to deceive, should be restrained. (*c*) A trade-mark, "The Rising Sun," with a vignette of the sun, is not infringed by the words "Rising Moon," with a vignette of the moon. (*d*)

(*h*) *Talcot v. Moore*, 13 N. Y. Super. 106.

(*i*) *Brooklyn White L. Co. v. Masury*, 25 Barb. 416.

(*j*) *McCartney v. Garnhart*, 45 Mo. 693.

(*k*) *Gilman v. Hunnewell*, 122 Mass. 139.

(*l*) *Hostetter v. Vowinkle*, 1 Dill. 329; *Filley v. Fassett*, 44 Mo. 163.

(*m*) *Filley v. Fassett*, 44 Mo. 163; *Hostetter v. Vowinkle*, 1 Dill. 329; *Robertson v. Berry*, 50 Md. 591; *Leidersdorf v. Flint*, 50 Wis. 401.

(*n*) *Lockwood v. Bostwick*, 2 Daly, 621.

(*o*) *Popham v. Cole*, 66 N. Y. 69; *Osgood v. Allen*, 1 Holmes, 185. The intent to deceive is sufficient. *McLean v. Fleming*, 96 U. S. 245.

(*p*) *Brown v. Mercer*, 37 N. Y. Super. 265.

(*q*) *Hostetter v. Adams*, 10 Fed. Rep. 838.

(*r*) *Popham v. Wilcox*, 14 Abb. Pr. (N. S.) 206.

(*s*) *Burke v. Cassin*, 45 Cal. 467.

(*t*) *Partridge v. Menick*, 2 Sandf. Ch. 622.

(*u*) *Bradley v. Norton*, 33 Conn. 157.

(*v*) *Sohl v. Gelsendorf*, 1 Wils. (Ind.) 60.

(*w*) *Clark v. Clark*, 25 Barb. 76.

(*x*) *Williams v. Johnson*, 2 Bosw. 1.

(*y*) *Laird v. Wilder*, 9 Bush, 131.

(*z*) *Hurricane Lantern Co. v. Miller*, 56 How. Pr. 234.

(*a*) *Boardman v. Meriden Brit. Co.* 35 Conn. 402.

(*b*) *Apollinaris Brunnen v. Somborn*, 14 Blatchf. 380.

(*c*) *Enoch Morgan's Sons' Co. v. Schwachofer*, 5 Abb. N. C. 265. See *Same v. Troxell*, 57 How. Pr. 121.

(*d*) *Morse v. Worrell*, 10 Phila. 168.

PROTECTION OF RIGHT. The doctrine of protection of trade-marks is based upon the broad principle of protecting the public from deceit;(a) and injunction will be granted to restrain its practical use;(b) but to authorize an injunction plaintiff's title to its exclusive use should be clear and unquestionable,(c) and be clearly established.(d) The legal right of plaintiff and violation by defendant must be clear.(e) A person having appropriated to himself a particular label, sign, or trade-mark is entitled to the protection thereof, and the courts will enjoin their use without authority,(f) unless he has acquiesced in its use by a third party.(g) If the representation of the trade-mark does not mislead the public, and is substantially true, it will be entitled to protection.(h) A party may be restrained from the use of his own name in business, if he uses it for the purpose of deception;(i) or so as to appropriate the good-will of a business established by others of that name.(j)—[ED

(a) *Matsell v. Flanagan*, 2 Abb. Pr. (N. S.) 459.

(b) *Rowley v. Houghton*, 7 Phila. 39.

(c) *Ellis v. Zeilin*, 42 Ga. 91.

(d) *Wolfe v. Goulard*, 18 How. Pr. 64; *Corwin v. Daly*, 7 Bosw. 222; *Coffeen v. Branton*, 5 McLean, 256.

(e) *Merrimack Manufg Co. v. Garner*, 2 Abb. Pr. 318; *Petridge v. Merchant*, 4 Abb. Pr. 156; *Samuel v. Berger*, Id. 83; *Partridge v. Menck*, 2 Barb. Ch. 101.

(f) *Collady v. Baird*, 4 Phila. 139; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, Id. 603.

(g) *Delaware, etc., Canal Co. v. Clark*, 7 Blatchf. 112; *Caswell v. Davis*, 53 N. Y. 223; *Filley v.*

Child, 16 Blatchf. 376; *McLean v. Fleming*, 96 U. S. 245.

(h) *Meriden Brit. Co. v. Parker*, 39 Conn. 450.

(i) *Decker v. Decker*, 52 How. Pr. 218. Consult *Benninger v. Wattles*, 28 How. Pr. 288; *Holloway v. Holloway*, 13 Beav. 209; *Clark v. Clark*, 25 Barb. 76; *Stonebraker v. Stonebraker*, 33 Md. 252; *Devlin v. Devlin*, 67 Barb. 290; *Rogers v. Nowill*, 6 Hare, 325; *Holmes v. Holmes*, 37 Conn. 278; *Comstock v. White*, 18 How. Pr. 421; *Faber v. Faber*, 49 Barb. 357; *McLean v. Fleming*, 96 U. S. 246; *Probasco v. Boyon*, 1 Mo. App. 241.

(j) *William Rogers Manufg Co. v. Rogers, etc.*, Co. 11 Fed. Rep. 495. See *Gillis v. Hall*, 7 Phila. 422; *Ainsworth v. Bentley*, 14 Week. Rep. 630.

In re SAVAGE, Bankrupt.

(District Court, N. D. New York. May 23, 1882.)

BANKRUPTCY—DISCHARGE OF ASSIGNEE—NOTICE TO CREDITORS.

A step which in effect ends the bankruptcy proceedings should not be taken without notice to creditors. So, where an assignee sought to renounce his trust by making application for his discharge, based on his own affidavit, alleging that no tangible assets have come into his hands, and that he has no information of any property belonging to the bankrupt, other than a chose in action in favor of the estate, *held*, that notice to creditors of such application, and the approval of the register in charge of the case, was necessary.

COXE, D. J. The assignee in this matter makes application for a discharge, based on his own affidavit, alleging that no tangible assets have come into his hands, and that he has no information of any property belonging to the bankrupt. The affidavit also contains, in substance, the averment that he was, at the time of his appointment,

informed by the attorneys for the petitioning creditors that the proceedings were commenced to enable them to attack a fraudulent transfer, but that no suit had been or would be instituted for that purpose. With the moving papers is the consent of the attorney for the petitioning creditors to the discharge. The assignee was appointed on the second of March, 1877, and the appointment was approved by the district judge on the fifth of the same month. It is probable, therefore, that any right of action of the character named, existing in his favor, would now be barred by section 5057 of the Revised Statutes. No schedules were filed, and no complete list of creditors is found among the papers. There is, however, on file with the clerk the evidence of the agent of the bankrupt, in which appears a statement of all the creditors whose claims respectively exceed \$250—seven in all. With the exception of section 5038, which is applicable to cases of resignation by the assignee, there is apparently, no provision in the act for his discharge, except that contained in section 5096, as follows:

“Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt.”

Strictly construed the law furnishes no remedy where, in a case like the present, there is no property, no account to be examined, and where no meeting of creditors, after the first, has been held. It will be seen at a glance that a literal compliance with the requirements of the statute is impossible, but it should, I think, be followed as far as it is practicable to do so. Many of its provisions are directory merely.

A step which in effect ends the bankruptcy proceedings should not be taken without notice to the creditors; the fact that it was contemplated might induce them to furnish the necessary funds to set the machinery of the law in motion. Great injustice might result, in many cases, from allowing the assignee to renounce his trust without giving those most interested an opportunity to be heard.

This application may be renewed on notice to the creditors who are known, and on a certificate of the register in charge that the

assignee has in all things conformed to his duty under the bankrupt act; that his accounts, if any have been filed, are correct; that the discharge can work no injury to the estate; and that, in the opinion of the register it ought to be granted.

SPRAGUE v. SMITH & GRIGGS MANUF'G Co.

(Circuit Court, D. Connecticut. July 13, 1882.)

PATENTS FOR INVENTIONS—TIME WITHIN WHICH TO APPLY.

A patentee cannot be permitted to use for profit a machine which embodies a perfected invention for a period of two years or more, and then obtain a patent for the old machine by means of the addition of new improvements; but he may safely use for profit such a machine in its imperfect state to perfect his machine, and apply for a patent when perfected.

Charles E. Mitchell, for plaintiff.

George E. Terry and M. B. Philipp, for defendant.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement of letters patent No. 228,136, dated May 25, 1880, and letters patent No. 231,199, dated August 17, 1880, for improvements in machines for making buckle levers. Buckle levers are the part of a buckle which is so made as to hold the strap by friction, being a substitute for the ordinary buckle tongue, which penetrates a hole in the strap. They are extensively used upon "arctic" rubber shoes. The two patents are for different parts of the same complex machine.

It is not denied that the defendant has infringed the first, third, and fourth claims of No. 228,136, and the second, third, fourth, and fifth claims of No. 231,199. Infringement of the fifth claim of the earlier patent, and of the first claim of the later patent, is denied. Although, as is apparent from the defendant's admission in regard to infringement, the two machines are very similar, they differ somewhat in form.

In the plaintiff's machine, after the two slots have been punched in the blank, and it has been bent into a U shape, and has been thrust upon the end of a mandrel, a pair of movable dies "are advanced, one on either side of the mandrel and blank, on lines substantially at right angles to the flat sides of the U shape and of the mandrel. These dies have their engaging faces—that is, the faces that engage with the U-shaped blank—of such form and contour that when acting

upon the U-shaped blank in combination with the mandrel, they bend or swage it into" a partially-formed lever.

In the defendant's machine, after the U-shaped blank had been pushed upon the end of the mandrel, "there were two dies,—one on either side of the mandrel opposite to this U-shaped blank,—one of the dies—the lower one—being stationary in close proximity to the mandrel, the other die—the upper one—reciprocating vertically; the opposing faces of these dies having a configuration the reverse of that part of the mandrel occupied by the U-shaped blank, and having also portions of their surfaces adapted to form the bit of the buckle lever. As soon as the U-shaped blank was placed on the mandrel the upper movable die descended, and by means of this die, the lower stationary die, and the mandrel, the U-shaped blank" was bent into the same partially-formed lever which was produced by the corresponding operations of the plaintiff's machine. In the plaintiff's machine the sides of the mandrel and the faces of the dies are vertical, while in the defendant's machine the mandrel is horizontal, with a stationary die below it and a vertically-reciprocating die above it.

The fifth claim of patent No. 228,136 is as follows:

"In a machine for making buckle levers the combination with the mandrel, *m*, and dies, *n*, *n*¹, of the springs, *n*², *n*³, to press the dies forward into proper position relative to the mandrel, substantially as set forth."

In the plaintiff's machine there are two things connected with the dies "to press the dies forward into proper position relative to the mandrel" when the dies are not swaging the metal. The object of this pressure is said in the specification to be "in order that a slight looseness of the operating parts shall not permit the dies to be so far thrust backward as to permit the buckle levers to telescope or overlap each other as they push each other forward upon the mandrel."

In the defendant's machine, as used when this action was commenced, there was one spring "interposed between a bed plate and an arm of the mandrel support to hold the mandrel in close contact with the lower stationary die, and to press the mandrel and blanks downward towards or upon the lower die," for the purpose of preventing the blanks from telescoping as they are being thrust along upon the mandrel. This spring has been removed, and, it is said, without injury to the efficiency of the machine; but it is plain that the object of introducing the spring was to prevent telescoping. The substitution of one spring for two, and the location upon the mandrel instead

of upon the dies, are immaterial variations of the form of this part of the mechanism.

The first claim of No. 231,199 is as follows:

"In a machine for making buckle levers, the combination of the mandrel, *m*, provided with the ribs, *m*, *m*², of the dies, *n*, *n*¹, *o*, *o*, and a support which presses the part, *u*, of the lever against the rib, *m*, substantially as set forth."

In the specification the support is described as follows:

"It will be understood that the wedging tongue, *n*², supports the lower end of the part, *u*, of the lever firmly, while the dies, *n*, *n*¹, are compressing the metal upon the mandrel; but owing to the wedge-shape of this tongue, when the die, *n*, is withdrawn from the mandrel the blank is released from upward pressure against the mandrel, so that it can be readily fed forward to the dies, *o*, *o*."

In the defendant's machine the support is not fixed to the movable die, as in the plaintiff's mechanism, nor is it yielding. It is attached to the fixed die and performs the office which is described in the first claim. The defendant's expert thinks that its machine does not infringe this claim, because the mandrel is not provided with the rib, *m*², and because the second pair of dies, *o*, *o*, does not exist, and because the support is not removed after the action of the dies. The rib, *m*², in the defendant's machine is on the fixed die, which is the stationary part of that machine, while the mandrel is the stationary member of the plaintiff's forming mechanism. The ribs have the same office in the two machines. The dies, *o*, *o*, were formerly on the plaintiff's machine, but have been removed since this suit was commenced. So far as is disclosed in the testimony, the patented machine was the first one to make "beaded" arctics in one operation. The patent was not confined to the mere form of mechanism which the inventor adopted, and the "support" is not limited by the first claim to one which moves away after the action of the dies.

The main defence is that the two patents, Nos. 228,136 and 231,199, with the exception of the fifth claim of the former and the first claim of the latter, are void, because the machine, with the exception of the mechanism described in said claims, was in public use for more than two years before the date of the application for letters patent. But one application, dated December 2, 1878, for a patent upon the entire machine was originally brought. This was afterwards divided into two applications upon different parts of the same machine. In order to defeat the patents, the machine must have been in public use before December 2, 1876. *Graham v. McCormick*, 21 O. G. 1533.

The facts are that from 1862 to 1868 the patentee made another kind of buckle from those produced by this machine upon two or more different machines. Between 1868 and the fall of 1873 another kind of buckle was made by one machine. For a year prior to the fall of 1874 he made the "beaded" buckles, *i. e.*, the kind now under consideration, upon two machines. In 1874 he ordered the skeleton of the patented machine from Bliss & Williams, his workmen or himself making the patented portions. This machine was in a condition in which it was used to manufacture buckle levers in the fall of 1874, and continued to be so used, without substantial change, until the spring of 1878; but it was not a perfected invention. It had two defects,—one that it choked, and the overlapping blanks had to be picked apart by a workman; another that the bead was not parallel with the slot, because the blank could not be forced upon the mandrel evenly. Nevertheless, it was used, in some seclusion from the public, to make levers, and it made about 50,000 gross, which were sold; but the organization was defective until it was perfected in the early part of 1878 after repeated experiments. The inventor always adhered to the idea of perfecting the invention and then obtaining a patent upon it. The two improvements which were introduced in 1878 were the springs between the levers and the dies, which prevented overlapping, and the rib, *m**, in order to keep the blank in position when it was forced upon the mandrel. These changes, which are apparently not of great importance, perfected the invention, and enabled the inventor to take the final step between partial and complete success.

It is perfectly true that a patentee cannot be permitted to use for profit a machine, which embodies a perfected invention, for a period of two years or more, and then obtain a valid patent for the old machine by means of the addition of some new improvements which, in the language of Judge Lowell, "were intended to benefit the patent rather than the machine." The present case is that of a machine which was imperfect, and which demanded and received the continuous experiments of the inventor to remedy the defects in its organization. It is not true that the inventor cannot safely use for profit such a machine in its imperfect state, lest two years should elapse during the experimental period before the invention is completed and the patent is applied for.

The plaintiff is entitled to a decree for an injunction and for an accounting.

SAWYER v. MILLER and others.*

(Circuit Court, S. D. Georgia, W. D. May Term, 1882.)

1. LETTERS PATENT—COTTON-GINS—INCONSISTENCY AND UNCERTAINTY IN DESCRIPTION.

In reissue to Peter C. Sawyer, No. 6,169, there is an inconsistency between the first and fourth specifications, or else a failure to describe with clearness the invented patent.

2. WHAT WILL SUSTAIN A PATENT.

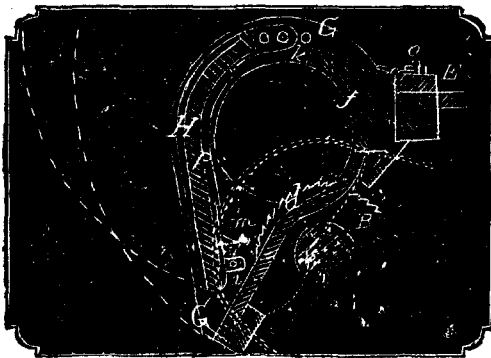
A mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

3. ISSUANCE OF A PATENT—EFFECT.

The issuance of a patent makes only a *prima facie* case that the thing is patentable and that the patentee is the original and first inventor

In Equity. On final hearing.

The following is a representation of the patent upon cotton-gins claimed by Peter C. Sawyer:



H. Front.

f. Cotton board.

d. Upper portion of ribs.

The first claim is for "the front, *H*, with interior curve, the center board, *f*, with interior curve, and the curved upper portion of the ribs, *d*, combined and forming the major part of a circle in the roll box, so that the cotton is ginned by the saws in a circular roll." The fourth claim is for "the swinging front, *H*, hinged at the upper end, and both the upper and lower ends made adjustable." One question in the case was as to the inconsistency in these specifications; the

*Reported by W. B. Hill, Esq., of the Macon bar.

contention of defendants' counsel being that the combination upon which the patent is claimed, as above, could have no existence except at one particular adjustment of the gin, and that every change of adjustment, however slight, would destroy the combination, and with it the patent as to its first claim. All other facts material to an understanding of the case are stated in the opinion.

Bacon & Rutherford and F. J. M. Daly, for complainant.

G. W. Gustin and W. C. Winslow, for defendants.

PARDEE, C. J. The complainant brings his bill against the defendants for infringement of his patent "for improvement in cotton-gins," being reissued patent No. 6,169. The invention claimed relates particularly to the cotton box or hopper of a cotton-gin, and consists in the construction of the swinging front cotton board and ribs to form the main portion of the cotton box perfectly round without any sharp corners, etc. The infringement alleged relates to the following specifications: (1) The front, with interior curve, the cotton board, with interior curve, and the curved upper portion of the ribs combined and forming the major part of a circle in a roll box, so that the cotton is ginned by the saws in a circular roll. (2) The swinging front hinged at its upper end, and both the upper and lower ends made adjustable.

The evidence shows that some time in 1876 the defendants made and sold some cotton-gins in which the cotton roll box, as to circular form, was apparently the same as the specifications of complainant's patent, but that they have made none since.

Also that the patent issued to Orren W. Massey, original letters patent No. 167,679, is identical with complainant's reissued letters patent No. 6,169, of prior date. The defences in the case are: (1) Inconsistency in description of alleged invention; (2) no invention to warrant a patent, taking into consideration "the state of the art" at the time; (3) prior invention of Massey.

The first thing that struck my attention on the hearing was that the thing itself, as represented by the drawings produced, did not agree with the description and specifications, and that it could only be made to agree by one particular adjustment of the swinging front, and that at every variation from that particular adjustment the front, the cotton board, and the upper portion of the ribs ceased to combine and form the major part of a circle, as required by the first specification. A careful examination since satisfies me that there is a serious inconsistency between the first and fourth specifications, or else a failure to describe with clearness and certainty what is the invented patent.

As to the effect of a failure to clearly describe the invention, see *Evans v. Eaton*, 7 Wheat. 434. And here the matter becomes directly important, for there is nothing in the evidence to show whether the boxes of the gins made by the defendants, claimed as an infringement, had adjustable fronts or not; and if not, the boxes of those gins could not, as shown by the drawings, be in anywise an infringement, because the several parts necessary could not be combined so as to form the major part of a circle. The case shows that at and long prior to the claimed invention of complainant cotton-gins were in use with so-called circular roll boxes. The front was curved, and so were the cotton boards and the upper portion of the ribs. The parts were formed on the axes of various-sized circles, not similar circles, having a common center, according to the idea of the manufacturer. The alleged invention is merely to combine these well-known parts so as to form with them the major part of the same circle, leaving just what we had before—a circular roll box doing the same work in the same way, and (under the evidence) with doubtful better results.

"A mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." *Smith v. Nicholls*, 21 Wall. 119. See, also, *Roberts v. Ryan*, 91 U. S. 159; *Dunbar v. Myers*, 94 U. S. 199.

As to the effect of mere change of form, see *Winans v. Denmead*, 15 How. 344, and *Eddy v. Dennis*, 95 U. S. 569.

In *Reckendorfer v. Faber*, 92 U. S. 357, we find: The combination to be patentable must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

In this case the combination is not shown to produce a different force or effect or result from that given by the separate parts. The claim even of less friction in the roll is not sustained by the evidence. Argument is made, supported by authority, that the issuance of a patent makes a *prima facie* case—*First*, that the thing is patentable; and, *second*, that the patentee is the original and first inventor. But this case so made is *prima facie* only. *Reckendorfer v. Faber, supra*. Here, I think, both points of the claimed *prima facie* case are overcome. The first, for the reasons hereinbefore given, and the second, by the showing made that the commissioner issued a subsequent

patent for the same invention to Massey after and based upon the decision of the examiner of interferences that Massey, and not complainant, was the prior inventor.

On the whole case I am not satisfied that the specifications of the claimed invention are in "such full, clear, and distinct terms as to distinguish the same from all others before known," nor that the same is patentable, nor that complainant was the original inventor. The bill must therefore be dismissed, and a decree to that effect will be entered.

THE MARGARETHE BLANCA.*

(District Court, E. D. Pennsylvania. May 29, 1882.)

1. ADMIRALTY — GENERAL AVERAGE — SACRIFICE OF PROPERTY ALREADY INJURED.

Where property that has been displaced by a storm, although valuable and capable of being saved if the storm abates, is, from its position, an especial source of danger to the vessel, its sacrifice in order to save the vessel is a voluntary sacrifice, and its loss the subject of general average.

2. SAME.

The test in such cases is whether there was a reasonable chance of saving the property but for the continuance of the storm. If there was it was not lost, and the casting away of this chance for the common safety was a voluntary sacrifice, which will support a claim to contribution.

3. SEMBLE.

It would make no difference in such case that the danger was greatest to the property thus cast away.

4. SAME—SPARS BLOWN OVERBOARD.

A portion of a vessel's spars and sails was blown overboard by a gale and lay along-side the vessel, pounding against her side, but secured to her by the rigging. The gale continuing, the spars were cut adrift in order to prevent them from pounding a hole in the vessel's side. *Held*, that the cargo must contribute to the loss sustained by their sacrifice.

In Admiralty. Libel to enforce the payment of an adjustment of general average. The testimony disclosed the following facts:

On July 29, 1880, about noon, the bark *Margarethe Blanca*, on a voyage from Pillau to Philadelphia, laden with old rails and rags, encountered a squall, which carried away her head-gear, foretop-mast, and all above, with spars, rigging, and sails, and also her maintop-gallant-mast, and all above, with spars and rigging. This mass fell to leeward, and floated by the vessel's side, being secured by portions of the running and standing rigging. It appeared from the testimony that had the storm abated this material could have

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

been saved, and would have been valuable. The sea, however, was rough, and the spars began to pound against the vessel's side. The master and crew succeeded in getting out of the water and on deck the royal yard, together with one sail and the running gear, but the gale continuing, and there being danger of the remaining spars punching a hole in the vessel's side, the master, late in the afternoon, ordered the remainder of the floating material, etc., to be cut adrift, which was done. Subsequently the vessel encountered another gale, and was obliged to employ a steamer to tow her to port. Upon her arrival the loss was adjusted, and the adjusters included as part of the loss to be contributed for in general average the value of the spars, etc., cut adrift. Respondents, who were the owners of the cargo of rags, refused payment of their proportion of the value of this property, alleging that it was not the subject of general average, and should not have been included in the adjustment. This libel was then filed to enforce payment by them of their portion of the adjustment.

Charles Gibbons, Jr., for libellant.

Joseph Parrish, Edward Hopper, and Treadwell Cleveland, for respondent.

BUTLER, D. J. No discussion of the law of jettison, generally, is necessary. "If goods are thrown overboard for the purpose of lightening the ship in time of common peril, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all," is the language of the old Rhodian ordinance; and no subsequent statement has improved upon this concise definition of the general doctrine. From time to time its application has been extended,—so as to embrace goods destroyed or damaged in the act of casting away others, the furniture and other property of the ship, and the ship itself. No application of the doctrine has led to such earnest discussion, or such remarkable discordance, as that in favor of the ship and her property, and especially that description of property embraced in the general term "wreck."

The essential elements of a valid claim to general average are:—*First*, a common danger to ship and cargo—imminent, and apparently inevitable, except by the casting away of some part involved; *second*, a voluntary casting away of a part, to avoid the danger,—in other words a voluntary sacrifice of a part to save the remainder; *third*, the success of this effort.

That there was common danger in this case, is I think clear. It would make no difference that the danger was greatest to the property cast away, if it were so. But it was not. If the casting away had not occurred, it is more than probable that all would have gone down together. The attachments to the ship were such that the storm, act-

ing upon it and the suspended mass, would very soon have sent both to the bottom.

Was there voluntary sacrifice? What constitutes such sacrifice, in the sense involved, has been the subject of much discussion and disagreement, by text writers, and a good deal by courts. Where property has been displaced by storm, and itself becomes an especial source of danger, so that the master has, virtually, no option but to cast it away,—no choice between this and something else,—it has been strenuously urged by some authors and judges that there is no voluntary sacrifice in the act of parting with it; that the act is not voluntary because necessity requires it, and that it is not a sacrifice because the property, being so situated that it must necessarily be cast away, is already lost. When it is remembered, however, that this necessity arises alone from the continuance of the storm,—but for which the property would be as harmless, and as safe, as any other, and that in every case of lawful jettison, the property cast away is already doomed to certain loss, (as matters stand at the time,) the fallacy of this argument is apparent. From the earliest times a mast sprung or broken by storms, so as to become dangerous, or a part of the cargo displaced or from other cause rendered unsafe, and from necessity cast away for the common safety, has been the subject of general average. Wherever the circumstances are such as to afford reasonable chance of saving the property, but for the continued existence of the storm, the act of casting away must be regarded as a voluntary sacrifice. This I believe to be the true rule—having the support of all modern authorities: Lowndes, *Law of Gen. Av.* (2d Ed.) 24–32; 2 *Phil. Ins.* (4th Ed.) 1285; 1 *Parsons, Mer. Law*, 306; *Johnson v. Chapman*, 19 *C. B. (N. S.)* 58; *Barnard v. Adams*, 10 *How.* 303; *Star of Hope*, 9 *Wall.* 229. Arnold (*Arn. Ins.* 916, 2d Ed.) says: “If the will of man was in any way, even the least degree, contributory to the loss, that is all that is required [to make it a voluntary sacrifice.] It makes no difference that the pressure of circumstances was such as to prevent that will from being exerted except in one way.” The same, says Mr. Lowndes, is the view of Bailey, whose theory of “moral certainty” amounts to this: that a ship, or other thing, is never to be considered lost until a loss has actually occurred. Some observations contained in *Johnson v. Chapman*, Mr. Lowndes thinks, indicate that Arnold has gone a little too far in the passage quoted. He says: “The cutting away of that which, being in a state in which

it cannot be saved, is already lost, is not, according to these observations, such a sacrifice as to give title to contribution." It may well be doubted, however, whether Arnold intended to include such an instance,—where the property is already lost, in effect, and the cutting away, as is said in *Johnson v. Chapman*, simply anticipates what must inevitably and directly occur. Mr. Lowndes remarks, however:

"Thus far we may safely conclude: before any loss which is directly occasioned by the hand or will of man, acting with a view to the common safety, can be excluded from the common average, on the ground that the danger to the property lost is so extreme as to preclude the notion of sacrifice, it must be shown that no rational hope of saving it remained,—that no change in the weather, however sudden, no one of those rapid vicissitudes which occur in navigation, could have saved, or enabled to be saved, the property thus given for all; showing, in short, that the thing was only nominally destroyed by the act of man, having virtually been lost before."

This, in my judgment, is an accurate statement of the law.

Thus the question, in all cases such as this, before the court, is one of fact, to-wit: Was there, at the time, reasonable chance of saving the property, but for the continuance of the storm? If there was, it was not lost; and the casting away of this chance, for the common safety, was a voluntary sacrifice, which will support a claim to contribution. Where the property is still on deck, though displaced and dangerous, there is no room whatever to doubt the right to contribution for jettison, in the present state of the law. Whether it is so on deck, or by the ship's side securely attached, when cast away, can make no difference. Such a distinction would be illogical—without the countenance of either reason or respectable authority. The true inquiry must be: Were the circumstances such as to afford reasonable chance of saving the property, at the time of jettison, no matter how situated, if the storm had then abated?

That the property here involved could have been saved if the storm had so abated, is not open to doubt. Indeed, that it could have been saved if the storm had abated some hours later, provided the ship had survived, I have little doubt. The attachments were such that it is not improbable they would have survived the storm, long as it continued, if the ship had remained afloat. But the danger to the ship and cargo, (arising from the continuance of the storm) demanded the sacrifice of this chance of saving the property. The statement of experts that they regard the property as lost before it was cast

away,—that it could not be saved, etc., amounts to nothing. It means simply that, under existing circumstances, (the continuance of the storm, and the danger to ship and cargo,) it could not be saved; in other words, that the emergency demanded its sacrifice, that in this sense it was doomed to destruction, and therefore lost. All admit that with an abatement of the storm, (in its situation when cast off,) it could have been saved. That it would have been valuable if saved is not questioned. The witnesses call it "wreck," but this is of no importance. In the loose, general sense of the term it was "wreck." No more so, however, than a confused and broken mass of displaced spars and sails on deck, would have been. In *Johnson v. Chapman, supra*, it is said that this term properly means, "that which has been rendered *useless* or *irrecoverable* by peril of the sea." This property was not rendered either useless or irrecoverable, except by continuance of the storm. That adjusters have denominated all such property "wreck," and consequently excluded it from their estimate of loss, regardless of distinguishing circumstances, is also unimportant. Such a practice may be convenient and avoid controversy, and these considerations doubtless have led to its adoption, where pursued. If the practice of adjusters, however, was less variable and inconsistent than it is, the result would be the same. The question is alone for the courts. There is no recognized general custom governing the subject.

The libel must, therefore, be allowed.

THE HELIOS, etc.

District Court, S. D. New York. June 3, 1882.)

NEGLIGENCE—PERSONAL INJURY—DAMAGES.

In an action for damages for personal injuries sustained by an employe, engaged in storing cargo, falling through a hatch in the between-decks of a vessel, *held*, that it was negligence in those having charge of the vessel in leaving the chain-locker hatch open and unprotected, and in a dark place, after the first officer had notified the stevedore that the vessel was ready for stowing the cargo.

On the eleventh of September, 1879, the libellant was employed in loading the steam-ship Helios. He was working under a foreman who in turn was under the head stevedore. The loading of the lower

hold being completed, the foreman asked the first officer of the steamship if they could proceed to stow the between-decks. He replied that everything was ready. The foreman then instructed a gang of men, among whom was the libellant, to go below and close the hatches in the between-decks, and then stow the "oil-cake" in the between-decks. The Helios was a steamer fitted for carrying grain, and had a number of small hatches in her between-decks, in addition to the four main hatches. It was about 10 o'clock A. M., and a bright, clear day. The first whipful of cargo for the between-decks was hoisted over the side and lowered into the between-decks through the forward hatch. It consisted of several bags of oil-cake, large and heavy. The first bag was seized by two men, one the libellant, as it was lowered, and dragged forward to be stowed against the forward bulk-head. There was no light forward except what came down the fore-hatch, which was about five by seven feet. About 16 feet from the forward hatch was a small hatch without combings, leading to the chain lockers. This hatch was not used for cargo and was open. The oil-cake was to be stowed some five or six feet beyond this small hatch. The libellant did not know of it, and as he went forward with the first bag of oil-cake he fell down it, receiving the injuries to recover for which this libel was filed. The libellant asked for no artificial light to work by, nor was any furnished, and after the accident the stowing went on without any. There was evidence that lights were supplied to stow cargo by, in the port of New York, only if demanded by the workmen.

Beebe, Wilcox & Hobbs, for libellant.

Ullo & Davison, for claimant.

BROWN, D. J. I cannot entertain any doubt that it was negligence in those having charge of the Helios to leave the chain-locker hatch open and unprotected, as the evidence shows in this case. It was not a hatch for the usual stowage of cargo, such as stevedores must at their peril look out for and are presumed to know about. It had no reference to the cargo, and the stevedores had no business with it, as the evidence shows. When the first mate told the stevedore the vessel was ready for him to proceed to stow the cargo, that was a virtual warranty against all such traps in the darker parts of the vessel, which could not be or would not be perceived in the ordinary course of stowage. The evidence doubtless shows some exaggerations, but nothing which tends to create any doubt as to the evident fact that this hole was left open and unguarded, in a dark place,

after the first officer had said the vessel was ready for stowing the cargo.

Decree for libellant, with costs, and reference to compute the damages.

See 2 FED. REP. 240.

THE ATLEE.*

(District Court, E. D. Pennsylvania. April 3, 1882.)

ADMIRALTY—NEGLIGENCE—USING DOCK IN WHICH ANOTHER VESSEL IS SUNK—
DELAY IN REMOVING SUNKEN VESSEL.

A loaded lighter was sunk in a dock. Although 48 hours would have sufficed to remove her, she was allowed to remain for six days, during which two vessels successively entered and used the dock. Upon the lighter being raised it was found that she had been injured by one of the vessels, and a libel was thereupon filed against the second vessel. *Held*, that the libellant's delay, coupled with the fact that another vessel had previously occupied the dock, rendered ascertainment of the injury inflicted by the second vessel impracticable, and the libel should therefore be dismissed.

Semle, that, after a reasonable time for the removal of the lighter had elapsed, she might have been treated as a nuisance.

Libel by the owner of a lighter against the bark Atlee for damages on account of injuries alleged to have been inflicted on the lighter by the bark. It appeared that on February 18, 1881, the lighter, loaded with coal, sunk in a dock at Philadelphia. On February 24, 1881, the Atlee entered the dock. After she had entered, her captain was told by libellant that there was a lighter sunk in the dock; but on applying to the superintendent of the dock he was told that he would not injure the lighter, and that libellant had failed to remove the lighter, although ample time had been given him. When the lighter was raised she was found to be injured, but the extent of these injuries was in dispute. It appeared that she could have been raised in 48 hours and that another vessel of deeper draught than the Atlee had, subsequent to the sinking and prior to the arrival of the Atlee, occupied the dock during two tides. The libellant testified that immediately after the sinking he gave an order to parties to raise the lighter, but that they had neglected to do it.

George P. Rich, for libellant.

Curtis Tilton and *Henry Flanders*, for respondents.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

BUTLER, D. J. The libellant cannot recover. His sunken barge obstructed the channel. It was his duty therefore to remove it speedily. After sufficient time for this had elapsed, I incline to believe the vessel might have been treated as a nuisance. I think the authorities cited in respondent's statement of law support this view. It is not necessary, however, to decide the point. The delay, coupled with the fact that another vessel, the Havana, had in the mean time rested upon the barge, and as probably did mischief as the Atlee, has rendered ascertainment of the injury inflicted by the latter impracticable. This situation having resulted from libellant's negligence he must bear the consequences. Respondent must not be subjected to the danger of guessing, thus rendered necessary. That there was very great delay in removing the barge is not open to doubt. She could have been raised in 24 hours; and yet it was on the sixth day after she sank that the Atlee entered the dock. The failure of those whom libellant employed does not excuse him. It is not doubted that he could have had the work done within 48 hours, if he had displayed the energy and vigilance which his duty required. That the Havana rested upon the barge in advance of the Atlee, can only be questioned by imputing perjury to a witness, who appears to be disinterested and is uncontradicted.

A decree must be entered dismissing the libel, with costs.

THE D. S. NEWCOMB.

(District Court, W. D. Pennsylvania. May Term, 1882.)

1. ADMIRALTY—SERVICES—RAISING SUNKEN VESSEL.

The general maritime law gives no lien for services in raising a sunken vessel, rendered in her home port.

2. SAME—LOCAL STATUTE.

Nor is a contract for raising a sunken vessel within the purview of a local statute which gives a lien for work done or materials furnished "in the building, repairing, fitting, furnishing, or equipping" vessels, although the execution of the contract involves the bulk-heading, planking up, and closing the breaks in her hull to keep her afloat while being towed to the docks.

In Admiralty. *Sur* exceptions to libel.

John Barton & Son, for libellant.

Knox & Reed, for exceptants.

ACHESON, D. J. If it be conceded that the libellant's services were maritime, and that the libel sufficiently avers that they were rendered upon the credit of the D. S. Newcomb, the objection to this libel *in rem*, that they were performed at the home port of the boat, still remains. That in such case no lien exists by the general maritime law is settled. *The Lottawanna*, 21 Wall. 558; *Mon. Nav. Co. v. Steam-tug Bob Connell*, 1 FED. REP. 219.

Can the libel be sustained under the local statute? The steam-tug D. S. Newcomb had been sunk in the Allegheny river at the foot of Thirteenth street, in the port of Pittsburgh, and the libellant's services were in raising and putting her afloat ready for the dry-dock. The act of assembly, it seems to me, gives no lien for such services. "All debts contracted * * * for or on account of work and labor done or materials furnished * * * in the building, repairing, fitting, furnishing, or equipping" vessels, is the language of the act. Par. 97. In the present case the contract was for raising a sunken boat for a specified sum of money. It is true the libel avers that this "involved the necessity of making material repairs to said vessel by bulk-heading, planking up, and closing breaks and openings in her hull, and making the same seaworthy, so that said vessel could be towed and navigated and taken to the docks located on the Ohio river, in the lower part of Allegheny City." But the main thing was the raising of the boat, and the alleged repairs were merely incidental, and but temporary expedients to keep the boat afloat while being towed to the neighboring docks for repairs. The act of assembly is not to be enlarged by construction. I am of opinion that it does not embrace the libellant's contract.

The third exception to the libel is sustained. Let a decree be drawn dismissing the libel, with costs.

MITCHELL v. TILLOTSON and others.

(Circuit Court, S. D. Illinois. July 7, 1882.)

REMOVAL OF CAUSE—NECESSARY PARTIES—CONTROVERSY TO BE FULLY DETERMINED.

Where one of two necessary party defendants is a citizen of the same state with the complainant, and there is no separable controversy between the complainant and the other defendant, citizen of another state, which can be fully determined as between them without the presence of the defendant who is a citizen of the same state with the complainant, the federal court has no jurisdiction.

HARLAN, Justice, (*orally*.) This suit in equity was commenced in the circuit of McLean county, Illinois, and was thence removed, upon the petition of Tillotson and the insurance company, to the circuit court of the United States for the southern district of Illinois. The complainant moved to remand the cause to the state court, upon the ground that it was not removable under the statutes regulating the jurisdiction of the courts of the United States. The complainant is, and was at the commencement of the suit, a citizen of Illinois, as were also the defendants Tillotson and Winegardner. The insurance company, the remaining defendant, is a corporation created by the laws of Massachusetts. The facts bearing upon the question of jurisdiction are these: Winegardner having borrowed of the insurance company the sum of \$3,500, (for which he gave his bond, or note, with interest coupons attached,) executed a deed of trust conveying to Tillotson two lots, or parcels of land, in Bloomington, Illinois, in trust to secure the repayment of the amount so borrowed. The deed provided that in case of default in the payment of the bond, or of any interest coupon at maturity, the principal should become due, and the trustee should, upon the application of the legal holder of the bond, after having advertised for 30 days in a public newspaper in McLean county, sell the premises, and all the right, title, and equity of redemption and homestead of Winegardner, to the highest bidder, for cash, execute to the purchaser a conveyance in fee for the premises so sold, and apply the proceeds to the mortgage debt. A default in paying interest having occurred, the trustee, in conformity with the demand of the company, advertised the property for sale. The present suit was brought by Mrs. Mitchell, for the purpose of enjoining the sale of one of the lots. Her suit proceeds upon the ground that the lot in question is her separate property, and that whatever rights were acquired in or to

that lot by Tillotson or the insurance company under the before-mentioned deed of trust are subordinate and inferior to hers.

Held, that the citizenship of Winegardner seems to be immaterial, since his title appears from the pleadings to have passed absolutely either to complainant, or, under the deed of trust, to Tillotson. He has no interest whatever in the result of the present controversy. But Tillotson acquired such interest in the property as makes him an indispensable party defendant with the company. The complainant could not obtain the relief asked without joining him as a defendant with the insurance company. In other words, there is in the suit no separable controversy between the complainant and the insurance company which can be fully determined as between them without the presence of the trustee as a party defendant. The trustee and the company are inseparably connected in resisting the relief sought. It is therefore a material circumstance that Tillotson is a citizen of the same state with the complainant.

That fact defeats the jurisdiction of the federal court, and the cause must be remanded to the state court. *Coal Co. v. Blatchford*, 11 Wall. 172; *Sewing-machine Cases*, 18 Wall. 5; *Ribon v. Railroad Co.* 16 Wall. 446; *Knapp v. Railroad*, 20 Wall. 130; *Gardner v. Brown*, 21 Wall. 36; *The Removal Cases*, 100 U. S. 457; *Barney v. Latham*, 103 U. S. 205; *Evans v. Faxon*, 10 FED. REP. 312; *Blake v. McKims*, 103 U. S. 339.

In the case last cited it was said:

"We are of opinion that congress, in determining the jurisdiction of the circuit court over controversies between citizens of the different states, has not distinctly provided for the removal from a state court of a suit in which there is a controversy not wholly between citizens of different states, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked."

The cause must be remanded to the state court. It is so ordered.

It is proper to say that in what I have said the circuit judge and the district judge concur.

BEAN and others v. PATTERSON and others.

(Circuit Court, W. D. Missouri, W. D. October Term, 1881.)

INSOLVENT DEBTOR—PREFERENCE TO CREDITORS.

The creditors of a contractor in failing circumstances agreed together to buy his land, and to be interested therein in proportion to their several claims, and a deed therefor was made by the debtor and his wife to two of the creditors for the parties interested in the purchase; the purchase money to be made up of various items of indebtedness of the debtor to the parties interested in the purchase, who had, on their part, to remove the liens of two judgments, which judgments were not paid off, but were assigned to the parties to be held for contingencies. Subsequently an attachment was sued out against the land. *Held*, that the deed from the debtor and wife be set aside, and the deed of sale of the land to one of the defendants, under an assignment of the trust deed of the wife made to her for a debt due her by the husband, be set aside; and that the land attached be sold, and the fund applied, first, to the payment of taxes; next, to the amounts of the judgments, with interest; next, the amount for which the deed of trust was assigned, with interest; and next, the complainants, the amount of their judgment, with interest—the difference between the amounts of the wife's trust deed and the amount for which she assigned it to be reserved for further consideration.

In Equity.

Botsford & Williams and John P. Lewis, for complainants.

Vories, Pike & McKillop, for defendants.

KREKEL, D. J. The bill in this case alleges that complainants in 1873 contracted with defendant William Miller for work to be done on a railroad then building in Ohio; that during the years of 1873 and 1874 work amounting to \$16,000 was done under said contract; that on defendant failing to pay for same suit was instituted by plaintiffs in Atchison county, Missouri, and sundry tracts of land attached by virtue of process sued out; that judgment for \$14,276 was obtained in the suit; that execution issued, and \$3,257 and costs were collected thereunder; and that the remainder remains unpaid. The bill proceeds to allege further that on examination of the title of the land attached, such as was not sold under the execution spoken of was found to be encumbered by liens, namely, a deed of trust given in 1873 by William Miller, the defendant in the attachment suit, to Patterson, as trustee for his wife, Mary Miller, for \$10,000, due in 1876, and a judgment lien of Koontz for \$2,071, which encumbrances it is claimed were made and sought to be maintained for the purpose of hindering and delaying the enforcement of liabilities of said William Miller, and specially the complainants, who instituted proceedings in the state courts to remove the clouds upon the title so as to

enable them to sell the land and collect their claims. The proceedings spoken of, instituted in the state courts, were, by change of venue, removed into this court, and constitute the subject-matter in litigation. The bill further charges that, after the institution of their attachment suit and proceedings to remove the clouds from the title of the land attached, defendants William Miller and wife, on the third day of January, 1876, conveyed the whole of the land in litigation to Horn and Weaver, two of the defendants, but that, aside from them, other defendants were interested therein; that at the time of said conveyance the trust deed heretofore spoken of was pretended to have been assigned to defendant, Saeger, in consideration of \$12,000; that said conveyance and assignment were in fact for the mutual benefit of the defendants named in the bill, and were contrivances to defraud the creditors of William Miller. The bill proceeds further to charge that the Koontz judgment was in reality paid off and satisfied, and kept alive by assignments, so as to encumber and cloud the title. The bill next proceeds to state that when the deed of trust fell due in 1876, Saeger, as assignee thereof, as stated, had the land thereby conveyed sold, and that he, Saeger, became the purchaser thereof, but that in fact said sale and purchase were made under the collusive arrangements charged, for the benefit of the conspirators. The bill thereupon prays that the deed of trust from William Miller to his wife be declared null and void; that the Koontz judgment be declared no lien; and that the defendants interested be made to account for the rents and profits of the land during the time they had the same in possession.

The defendants, answering the bill, say that the transactions had regarding the lands in controversy were all made in good faith and for valuable considerations; deny the intent of hindering or delaying creditors and their liabilities for rent.

The testimony tends to show that William Miller, about 1870, was a man of considerable property, engaged in large undertakings as a contractor; that his own means were not sufficient to carry them on; that his wife owned property worth \$14,000, aside from a farm which Miller purchased and had conveyed to her; that to raise funds for his purposes he borrowed money as early as 1870 and 1871, and to secure it Mrs. Miller's property was mortgaged; that the property mortgaged was sold and the debts incurred by Miller paid with the proceeds. The preponderance of the testimony shows the indebtedness from Miller to his wife to have existed long prior to any claim the complainants had against Miller; indeed, the trust deed given by

William Miller to his wife was made and recorded about the time the work under the contract between Miller and the complainants was done. Stress is laid by complainants on the fact that Mrs. Miller assigned her deed of trust to Saeger, one of her husband's creditors, who is charged to be in the combination and conspiracy to defraud, hinder, and delay Miller's creditors. But for this fact there could scarcely be any doubt that Mrs. Miller would be entitled to her deed of trust and the control of it. Is this fact alone, without any proof of her acting in bad faith, to deprive her of the right to dispose of her property as she chooses?

The law allows the wife to hold property and deal with it in her own way, and the rules applicable to dealings generally apply to her. When there are questions as to whether the wife has property of her own, and doubts exist whether the husband is seeking to use the wife's name to cover up his property from creditors, the acts done between husband and wife pertaining to property claimed by the wife will be closely scrutinized to see that their dealings are in good faith. So, also, in cases where the property of the wife, by her consent, is so mixed up and used by the husband that it cannot well be distinguished.

In the case before the court the assignment made of the trust deed to Saeger at most amounts to but a choice among creditors of her husband, for there is not a doubt that Saeger was a *bona fide* creditor of her husband. Nothing went to the wife under the assignment of her deed of trust. It is quite clear from the testimony that in 1876 and long prior thereto Miller was indebted to Saeger, Horn, Weaver, and the Bank of Catasauqua, and, finding that he was in failing circumstances, they agreed together to buy the land in controversy, and to be interested therein in proportion to the amount of their several claims against Miller. They purchased the land at \$36,400, and the deed therefor was made by Miller and wife to Horn and Weaver for the parties interested in the purchase. The testimony shows the purchase money to have been made up of various items of indebtedness of Miller to the parties interested in the purchase. The purchasers had to remove the liens of two judgments,—one in favor of Koontz, now amounting to near \$4,000, and another to Van Sycle of \$700,—which were liens on the land, to make good their title. These judgments were not paid off, but were assigned to the parties interested to be held for contingencies. Six thousand of the \$36,400 were retained by the purchasers for the same purpose. What these contingencies were is not difficult to define. An attachment for

\$16,100 had been sued out by complainants and levied on the land in controversy. Notice had been filed in the recorder's office of Atchison county of the levy of the attachment at the time of issuing the same. Contingencies arising from this source were to be provided for, and hence the precautions taken. The whole transaction amounts to this: Here are a number of creditors seeking to collect their debts. By the purchase of the farm they get into their possession all the debtor had. The deed of trust and the judgments were liens on the land prior to the attachment, and could not, therefore, be defeated by it. If the attachment prevailed over their deed, the amount of the deed of trust and moneys advanced on the judgment would be refunded, so that nothing could be lost in that direction, but something might be saved, if the farm sold for more than the liens, debts, and the attachments.

This being the condition of the case, the court sees no difficulty in arriving at a proper adjustment of the matter. The deed from Miller and wife to Horn and Weaver, dated January 3, 1876, will be set aside and held for naught. Saeger, as assignee of the trust deed of Mrs. Miller, having caused the land to be sold under the trust deed, himself becoming the purchaser and taking a deed therefor, that deed will be set aside and for naught held. The case will be referred to a master to take an account for rents since the possession taken under the deed from Miller and wife to Horn and Weaver, and report the value of any permanent improvements or repairs made during the time of their possession, and the amount of taxes paid thereon, and taxes now due, if any. Upon the coming in of the master's report an order of sale will be made for the whole of the land attached, excepting the quarter section sold by the sheriff, the proceeds whereof have been paid to the complainants. The funds will be applied as follows: First, to the payment of unpaid taxes; next, the amounts of the Koontz and Van Sycle judgments, with interest; next, the amount for which the deed of trust was assigned, with interest, (the difference between the amount of Mrs. Miller's trust deed and the amount for which she assigned it to Saeger is reserved for further consideration;) next, the complainants the amount of their judgment, with interest.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BERGEN v. MERCHANTS' EXCHANGE NAT. BANK OF NEW YORK, impleaded, etc.

(Circuit Court, S. D. New York. July 11, 1882.)

MUNICIPAL BONDS—AUTHORITY TO BE STRICTLY CONSTRUED.

Where municipal bonds do not contain recitals asserting them to be issued conformably to law, a purchaser for value cannot recover.

J. D. Bedle and Hamilton Wallis, for complainant.

Stephen P. Nash, for defendant.

WALLACE, C. J. This suit is brought to compel the defendant to surrender 102 bonds for \$500 each, now held by the defendant, which purport to be the negotiable obligations of the corporation complainant, but which, as is alleged, are not in fact the obligations of the complainant, but are unauthorized and fraudulent instruments executed and issued by one Bogert, some of them while he was the collector of Bergen county, and some of them after he ceased to be such collector.

Prior to 1876 the complainant had issued, pursuant to law, certain bonds known as "bounty bonds," which were to become due July 1, 1876, and upon which there would be then payable the sum of \$362,800. By an act of the legislature of New Jersey of April 5, 1876, it was provided that the board of chosen freeholders of any county of the state might renew any loan for which bonds had theretofore been issued by law, when the same might thereafter become due, by the issuing of new bonds for the loan in any part thereof. Such bonds were to be either coupon or registered bonds, in the discretion of the board, and were to be numbered; and the collector of the county was required to make a register of the number, denomination, date of issue, and time of payment in a book to be provided by the board for that purpose. The act provided that such bonds should be executed by attaching the seal of the corporation, and be signed by the director of the board and the clerk thereof, and be countersigned by the collector.

Under the authority of this act the corporation resolved to issue new bonds. Proposals for the purchase of bonds to the amount of \$360,000 were invited by advertisement, and 800 coupon bonds for \$500 each were lithographed and prepared for the signature of the proper officers, in blank as to the name of the payee and as to the time of payment, and having the signature of the collector lithographed upon the coupons. Instead of selling the bonds at public

sale, however, the bonds were issued by the proper officers from time to time during the early summer of 1876, as they were needed to retire old bonds; some of them being sold and the proceeds used to pay off old bonds, and some of them being directly exchanged for old bonds. When thus issued the blanks were filled up and the bonds were signed and sealed. It was largely left to the collector, Bogert, as the financial officer of the corporation, to negotiate the sale and exchange of the bonds, and to carry out the details of the transactions. On several occasions a large number of bonds were signed by the auditor and clerk, to be filled out and countersigned by Bogert when he should have occasion to issue them. Bogert was entrusted with the custody of the seal, in order to affix it when he should require. Finally, at the suggestion of Bogert, the director and clerk affixed their signature to all of the 800 bonds remaining undisposed of; it being understood that no more should be issued by Bogert than were required to retire the old bonds, and that he should destroy the rest.

As the financial officer of the corporation, Bogert had the control of its funds, and paid its current expenditures. He made the temporary loans for the needs of the corporation. In March, 1876, he made a loan of the defendant for the benefit of the corporation, but in his own name, and pledged as security \$40,000 of the temporary certificates of the corporation. He continued to hold the office of collector until May 8, 1878. He died January 8, 1880. After his death it was discovered that the defendant held the bonds in suit, and that they had been fraudulently issued by Bogert, he having countersigned and sealed 102 more of the bonds which the director and clerk had signed than were required to retire the old issue of bonds. A difficult question of fact arises upon the proofs in regard to the time when these bonds were countersigned and issued by Bogert, but the conclusion is reached, although not without great hesitation, that 24 of the bonds were thus countersigned, issued, and pledged by him as security for loans with the defendant while he was the collector of the corporation, and that the remaining 78 were not countersigned or issued by him until after he had ceased to be collector.

Upon these facts, although the defendant is a holder of the bonds for value, it must be adjudged to surrender them to the complainant. As to the 78 bonds countersigned by Bogert after he ceased to be collector, his signature as collector is a forgery, and the complainant is for that reason not liable upon them. As to the 24 bonds issued by Bogert while he was collector, a conclusion adverse to the defendant

is reached upon the constraining authority of *Buchanan v. Litchfield*, 102 U. S. 278. Here, as in that case, the bonds did not contain any recitals to show that they were issued in conformity with the act of the legislature which empowered the municipality to create the obligations. The act authorized the complainant to issue new bonds for the specific purpose of renewing loans for which its bonds were then outstanding. The act did not require the new bonds to be exchanged directly for the old bonds, as has been argued by counsel for the complainant; but it did limit and restrict the power of the officers of the municipality to the creation of obligations for a specified object, and to an extent which was capable of ascertainment. While the officers of the municipality were authorized in their discretion to sell the new bonds and retire the old ones with the proceeds, if the holder of an old bond should refuse to exchange it for a new one; or if the new bonds could be sold at a premium; or if, for any other reasons, it might be more desirable to sell the new bonds than to exchange them directly for old ones,—there was no method by which a purchaser could ascertain whether the officers of the county were acting within the limits of their authority or not. He might be able, perhaps, to ascertain what was the amount of the old indebtedness by examining the records of the municipality. If those charged with issuing the bonds kept the register required by law to be kept, he might, if permitted to inspect it, ascertain how many had been issued, but he could not know whether all registered had been actually sold, or what sum had been realized from their sale. The officer charged with the duty of keeping a register of the bonds was the person directly entrusted with negotiating them, and could conform his register to suit his own fraudulent aims if so disposed. In short, a purchaser of the bonds was of necessity required mainly to rely upon the representations and good faith of the officers to whom the issuing of the bonds was committed.

Concededly the purchaser of negotiable securities which are issued by agents or officials must assume the risk of being able to establish the authority of the agents or officials to bind their principal; but when the officers of a municipal corporation are permitted by law to put its obligations upon the market and dispose of them to purchasers under circumstances which preclude the purchaser from knowing whether the officials are keeping within the exact limits of their duty, and he can only know that they are acting within the general scope of their powers, there is no reason why a municipality should not be as effectually estopped by the acts of their agents as a business corporation or a private person would be under the same circumstances.

Now it has over and again been held by the federal courts that when these officers insert recitals in such bonds declaring them to be issued in conformity with the statute which authorizes the municipality to incur the obligation, a purchaser need go no further; he may rely on the truth of the recitals, and the municipality is concluded by them. And so in this case, if the bonds contained similar recitals, the court would justify the purchaser in reposing upon them and the defendant would be protected. Where any logical distinction can be found between the character and effect of a representation made by the officials in the bond itself, and one made by them outside the bond, and orally or by conduct to the purchaser, it is difficult to perceive. What stronger representation can be made than is attested by the fact that they have executed the bonds and put them in circulation, and thus by their official signatures and acts given them currency as valid obligations?

Nevertheless, the precise point was ruled adversely to these suggestions by the supreme court of the United States in *Buchanan v. Litchfield*. In that case the municipality was restricted in issuing its bonds to the creation of an indebtedness which should not exceed 5 per centum on the value of the taxable property of the corporation, to be ascertained by the last previous assessment for state and county purposes. The court say the extent of the indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the city, which could not, with reasonable certainty, be ascertained from any official documents to which the public had access. But as the bonds did not contain recitals asserting them to be issued conformably with law, it was held a purchaser for value could not recover when it appeared that the restriction had not been strictly observed. Applying the rule thus enunciated, the defendant cannot rely upon its title as a holder for value, and must surrender all the bonds in suit.

A decree is ordered for the complainant.

DICKINSON v. LAMOILLE COUNTY NAT. BANK and others.

(Circuit Court, D. Vermont. July 14, 1882.)

MORTGAGE—FORECLOSURE—RIGHTS OF ATTACHING CREDITOR.

An attaching creditor, on an attachment made before proceedings to foreclose, is a proper party to the proceedings, and is not bound by the decree unless made a party to the suit, and he acquires a right to redeem the mortgage or submit to be foreclosed; but where neither he nor the debtor redeems, he loses his right and it is foreclosed as to him, and he is not entitled to the benefits of any agreement made by the debtor affecting the decree.

In Equity.

William H. Dickinson, for orator.

Philip K. Gleed, for defendant.

WHEELER, D. J. This cause has been submitted on bill, answers, replication, proofs, admission of facts, and briefs. From the pleadings, proofs, and admission it appears that the orator was the owner of a note against one Griswold, on which suit was brought in the name of the defendant Heath; and among other real estate of Griswold a farm was attached subject to a mortgage to one Wheelock, then being foreclosed; that subsequent to the attachment a final decree of foreclosure was entered that unless the mortgage debt should be paid in instalments, at certain times fixed, Griswold and all persons claiming under him should be foreclosed and forever barred of all equity of redemption in the premises; that afterwards Griswold became largely indebted to the defendant bank, and after paying all the instalments of the foreclosure but the last two, executed a mortgage to the bank of all the real estate to secure that indebtedness; that at the solicitation of Griswold, and for the purpose of aiding him, the bank entered into an agreement in writing with him, by the terms of which, in consideration of certain payments made and to be made at specified times by him, the bank agreed to assign all its claims and securities to the attorney of Griswold, and in case it should become the owner of Wheelock's decree to assign that also, on payment of what the bank should pay for it, with interest, and that in case the several sums should not be paid by the time stated the bank assumed no obligation by the contract; that the bank paid the amount of the instalments due to Wheelock and took the decree. The first payment to be made by Griswold under the agreement was after the expiration of the time of redemption in the decree. Griswold made a part of the payments, but not all of them, and finally the bank took possession of all the premises and sold them to the

defendant Hendee, who sold one-half and afterwards the other to the defendant Paige, who paid a large part of the purchase money, and more than the amount of the Wheelock decree paid by the bank, without any notice or knowledge of the agreement between the bank and Griswold. Judgment was recovered in the suit in the name of Heath against Griswold, and the land covered by the decree was levied upon subject to the Wheelock mortgage, appraised at the amount due on the last two instalments, and set out to the creditor in satisfaction in part of the judgment. This bill is brought by the orator as equitable owner of the judgment, and of the right to the land set off to satisfy it to redeem the land from the Wheelock mortgage. There is no question about the regularity of the foreclosure proceedings, or of the judgment, or of the proceedings in levying upon and setting out the land to the creditors, nor as to the right of the orator to the judgment and its avails. The sole question is as to the right to redeem.

As the foreclosure proceedings were pending against Griswold when his right was attached, Heath and the orator, in whose right the attachment was made, were affected by them the same as if they had been made parties to them. Story, Eq. §§ 405, 406. The attaching creditor, if the attachment had been made before the commencement of the proceedings to foreclose, would have been a proper party to the proceedings, and would not have been bound by the decree without being made a party. *Chandler v. Dyer*, 37 Vt. 345; Gen. St. Vt. 1878, p. 841. The proceeding by attachment was *in invitum*, and by it the orator, through Heath, acquired a right independent of Griswold to redeem the mortgage, and by the decree he became bound to redeem it according to the decree, if he would save his right to the equity of redemption acquired by the attachment. Griswold had the right to redeem or not as he might be able or see fit; the orator had the right to redeem or not as he might see fit. If either redeemed it would be redeemed, and respective rights would take place accordingly; and if neither redeemed both would be foreclosed. Neither did redeem, and their respective rights became affected accordingly, except as varied by other circumstances. It is claimed by the orator that the agreement to take what the decree cost, after its expiration, opened the decree as to all parties. It is probably true that it did open the decree as to Griswold. It substituted a new agreement of the parties in place of the decree. By that agreement, if he paid, he was to have the premises. That was like the agreement in the original mortgage, by which, if he paid, he was to have the premises.

The original mortgage had to be foreclosed to cut off his right to redeem that, notwithstanding his failure to pay, and this agreement might have to be foreclosed anew to cut off his right to redeem, notwithstanding his failure to pay according to that. *Cooper v. Cole*, 38 Vt. 185.

The question remains, however, whether this agreement made with Griswold would open the decree as to the orator, who had no part in making the agreement. Had Griswold redeemed, the mortgage would have been removed from the estate and left it free as to that for the orator to levy upon; but that result would have followed from the fact of the redemption and not from the force of the agreement. Had the orator redeemed the decree, he could have stood upon it in his own right. *Wheeler v. Willard*, 44 Vt. 640. As no one redeemed it, he lost his right; it was foreclosed as to him. As a further foreclosure was made necessary only by the agreement, it would only be necessary as against the parties to the agreement. The new agreement was made with Griswold for his own benefit; the orator had nothing to do with it, and shows no ground for claiming that it was for his benefit, or for claiming the benefit of it. And further, if it could be said that as the orator is bound by the decree under Griswold, he should be entitled to the benefits of the agreements of Griswold affecting the decree, it would have to be said still further that, if he would take Griswold's agreement to stand upon, he must take it in all its parts as Griswold made it. Griswold was foreclosed, except for the effect of the agreement. He acquired no right to redeem except by the terms of the agreement. Should he bring a bill to redeem, it would have to be founded on the agreement. The orator can have no greater right than that. But he has not brought his bill, and does not by it offer to redeem according to that. He claims the right to redeem that parcel of the whole, and to have the benefit of that part of the agreement and let the rest go. Such a result would be highly inequitable. Still further, this purely equitable right to redeem cannot in equity be enforced against the purchasers of the legal estate without notice. The bank had the full legal title appearing of record, and had possession at the time of Hendee's purchase. This agreement did not appear of record. The proof not only fails to show that Hendee had heard of it, but shows affirmatively that he had not heard of it. The orator, therefore, has no right to redeem against him and his grantee.

Let a decree be entered dismissing the bill, with costs.

BLAIR and others v. CHICAGO & PACIFIC R. Co.

(Circuit Court, N. D. Illinois. July 7, 1882.)

REDEMPTION FROM FORECLOSURE SALE—CLERK'S COMMISSIONS.

The rule of the federal court requiring a party redeeming real estate, which has been sold under a foreclosure decree, to pay 1 per cent. commissions to the clerk, on the amount paid into court for the redemption of the property, in addition to the amount, with the prescribed interest thereon, going to the purchaser, is in accordance with section 828 of Revised Statutes, and is not in derogation of the right of redemption given by the state law. The right of redemption given by the state law must be permitted in the federal court, subject to the act of congress fixing the amount to be paid to the clerk on all moneys received, kept, and paid out by him in pursuance of any statute or under any order of court.

Larned & Larned, for complainant.

HARLAN, Justice. This court, some time back, adopted, and entered of record, rules in regard to the redemption of property from sales under decrees in chancery. One of these rules is in these words:

"Any defendant in the suit in which such decree is entered, his heirs, administrators, or assigns, or any person interested through or under the defendant in the premises so sold, may within 12 months from said sale redeem the real estate so sold by paying to the purchaser thereof, his heirs, executors, or assigns, or to the clerk of the court for the benefit of such purchaser, his executor, administrators, or assigns, the sum of money for which said premises were sold or bid off, with interest at the rate of 10 per cent. per annum from the date of such sale; and in case such redemption is made by payment of the money to the clerk, the person so redeeming shall also pay an additional sum of 1 per cent. on the amount so paid in, as the clerk's fee for receiving and disbursing said redemption money; and the clerk, on receiving said redemption money, shall at once deposit the same in the registry of the court."

A similar rule exists when the redemption is made by a creditor of the defendant who may be entitled under the law to redeem.

The property of the defendant was sold under deed of foreclosure for \$916,100. The purchasers of the property refusing to accept the redemption money, the railroad company was required to pay and did pay to the clerk of this court \$1,012,392.85, being the amount of the sale, with 10 per cent. interest from the date of sale, as required by the local statute, and 1 per cent. on the purchase money and interest, as required by the before-mentioned rule. Subsequently, and after the expiration of several days, the clerk, under the order of the court, paid out of the fund to the purchasers of the property \$1,002,369.19, being the purchase money and interest, leaving in court, of the fund, the sum of \$10,023.66.

The company now presents its petition asking that the balance of the fund in court, \$10,023.66, be paid over to it.

Held, the petition of the company rests upon the ground that the court had no power, by rule or otherwise, to require a party exercising the right of redemption given by statute to pay anything more than the purchase money, with the prescribed interest thereon. But in this view the court does not concur.

The statutes of the United States provide that "for receiving, keeping, and paying out money in pursuance of any statute or order of court there shall be paid to the clerk 1 per cent. of the amount so received, kept, and paid." Rev. St. 828; 10 St. at Large, 163-167.

The rules in question were made with reference to the decision of the supreme court of the United States in *Brine v. Ins. Co.*, which, reversing the long-established practice in this court, ruled that the right of redemption given by the statutes of Illinois constituted a rule of property to be respected alike in the federal and state courts in cases of decretal sales. The law of the state prescribed the mode in which redemption might be effected, and it was deemed necessary that this court should make rules upon the subject in conformity as near as might be with the rules governing the courts of the state. The rules in question were doubtless also made with reference to the statutes of the United States fixing 1 per centum as the amount to be paid to the clerk on money received, kept, and paid out by him in pursuance of a statute or an order of court. And that statute, it may be observed, giving this 1 per centum, is to be construed in connection with other provisions which require the clerk to report to the attorney general semi-annually all fees and emoluments of any kind by him received, and which limit the amount to be retained by him for his personal compensation in any one year to the sum of \$3,500. All above that sum is to be accounted for by him to the United States. It is not perceived why, upon money paid to the clerk of the court for the purpose of redeeming property sold, and by him kept and paid out, the statutory commission of 1 per cent. shall not be allowed as well as upon other moneys received, kept, and paid out by him under order of court. This case seems to be embraced by the language of the statute, and the rule of court is only in furtherance of the objects intended to be accomplished by it. The amount so paid to the clerk by the party redeeming may be regarded not only as a part of the costs of the litigation to be paid by the losing party, but also as part of the necessary costs and expenses incurred in carrying on the business of the court, and is to be accounted for to the government.

That the right to redeem is a statutory right given by the state does not affect the question. The purchaser of the property could not be required to pay the commissions of the clerk, since, under the statute, he was not obliged to surrender the property and the benefit of his purchase unless he received the full amount of his bid and interest thereon. The only mode, therefore, to obtain the per cent. which the statute in express words allows on all moneys received, kept, and paid out by the clerk was to require payment thereof by the losing party—that is, the party redeeming.

In brief, the duty of the court to allow the redemption given by the state law must be discharged, subject to the provision of the act of congress fixing the amount to be paid to the clerk on all moneys received, kept, and paid out by him under order of court.

The petition is denied.

COUNTY OF TAZEWELL v. FARMERS' LOAN & TRUST Co.

(Circuit Court, N. D. Illinois. July 7, 1882.)

1. STOCKHOLDERS—RIGHT TO SUE THEIR CORPORATION.

A county, as stockholder in a railroad company, brought suit against the company. *Held*, on demurrer, that where the bill shows a condition of things touching the control of the corporate affairs of those entrusted with their active management, as would have rendered a formal application to the board of directors to bring the suit an idle ceremony, a case is presented requiring the defendant to answer.

2. FORECLOSURE—FRAUD—SUIT TO SET ASIDE DECREE.

A ruling in a foreclosure suit, denying the petition of stockholders to be made parties, in a foreclosure suit brought against their corporation, is not a bar to an independent suit to set aside the decree for fraud.

J. S. Cooper, for complainant.

G. W. Cothran, for defendant.

HARLAN, Justice, (*orally*.) It may be true, as was intimated or suggested in oral argument, that this suit, if prosecuted to a conclusion after issue joined, cannot possibly result in any practical advantage to the complainants. Of this the court cannot now judge, nor can it regard such considerations under the allegations of the bill to which demurrers have been filed. Taking those allegations to be true, as upon demurrer must be done, a case is presented requiring the defendants to answer. It is contended that the complainants, as stockholders in the railroad company, do not show any right in themselves

to commence and carry on such a suit as this, and that the sole right to sue on account of the matters set out in the bill is in the corporation itself. In support of this view the court is referred to *Hawes v. Contra Costa Water Co.*, decided at the last term of the supreme court of the United States. Upon re-examining the opinion in that case it is seen that the right of a stockholder to sustain a suit in his own name, upon a cause of action existing in the corporation itself, will be recognized when the suit relates to a fraudulent transaction "completed or contemplated by the acting managers in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders." After enumerating other cases in which the right exists in stockholders to sue, the supreme court says: "Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers." The bill, it is true, does not show any formal application to the board of directors that action be taken in the name of the corporation to redress the wrongs alleged to have been done complainants and other stockholders. But it does show a condition of things touching the control of the corporate affairs by those entrusted with their active management as would have rendered such a formal application an idle ceremony. Under the circumstances detailed in the bill, the existence of which must, on this hearing, be assumed, and in view of the injury which might have resulted from delay in suing, it was not reasonable to require such previous application to be made to the board of directors. *Hawes v. Contra Costa Water Co. supra.*

Upon the argument of this case attention was called to the fact that these stockholders had petitioned to be made parties in the foreclosure suit, and that upon the showing there made the petition was denied by the circuit judge. The evidence upon which the court acted in passing upon that petition is not before the court on these demurrers. Besides, the ruling there is not a bar to an independent suit to set aside the decree for fraud. The present action of the court must rest on the allegations of the bill. Assuming them to be true, the demurrer must be overruled.

See *Hawes v. Contra Costa Water Co.* 11 FED. REP. 93, note.
v.12,no.9—48

SAWYER v. PARISH OF CONCORDIA.*

(Circuit Court, W. D. Louisiana. June, 1882.)

1. JURISDICTION—FEDERAL QUESTION.

When there is a federal question involved in the suit, the circuit court has jurisdiction, under act of March 3, 1875, without regard to the citizenship of the parties.

2. MUNICIPAL CORPORATION—CONTRACT—REMEDY.

When a municipal corporation has made a contract during the existence of a state law which provides an adequate remedy by compulsory taxation through the courts, that remedy is a vital element of the contract.

3. CONTRACT—STATUTE IMPAIRING OBLIGATION OF.

The subsequent repeal of that law, and the adoption of a new constitution prohibiting the levy of any judgment tax and limiting all taxation to the current support of the local government, would, if valid, impair the obligation of such a contract.

4. SAME—STATUTES UNCONSTITUTIONAL.

The invalidity of such enactments must be decreed by any court trying such a case before a judgment enforcing the contract by the original remedy of a judgment tax can be rendered.

5. SAME.

Such invalidity is the result of a violation of section 10, art. 1, Const. U. S., alone, and a suit to enforce the contract through that article is a suit "arising under the constitution of the United States."

6. JURISDICTION—CONCURRENT.

Though the plaintiff could sue in the state court, and could obtain full relief there, yet he can resort to the concurrent jurisdiction of the circuit court.

7. SAME—FEDERAL COURTS.

The jurisprudence of the state courts, construing the effect of said section upon state laws and constitutional articles, whether holding the latter valid or invalid as impairing the obligations of anterior contracts, cannot determine the jurisdiction of the federal courts.

8. SAME—JURISDICTION, ON WHAT DEPENDS.

The jurisdiction of the latter cannot be vested or divested by the character of the defence made, but depends upon the issues raised by plaintiff's petition, and necessary to be determined to afford him adequate remedy.

9. SAME—ACT OF 1875—QUERY.

Does not the *original* jurisdiction of the circuit courts, as enlarged by act of March 3, 1875, extend to all cases involving over \$500, which could have been carried, under former acts, to the supreme court on writs of error from state courts?

10. PLEADING—EXCEPTION TO JURISDICTION.

An exception to the jurisdiction admits, for the purposes of the trial of that plea, all the facts alleged in the plaintiff's petition.

W. W. Farmer, for plaintiff.

Boatner & Liddell, for defendant.

*Reported by *W. W. Farmer, Esq.*, of the Monroe, La., bar.

BOARMAN, D. J. The plaintiff, a lawyer and citizen of Louisiana, sues the parish of Concordia for \$27,000, claimed to be due to him because of certain professional services rendered the defendant, in pursuance of a conditional contract of date December, 1872. He alleges that he completed his part of the agreement before October, A. D. 1879, and that on the happening of the suspensive condition his contract became absolute and indefeasable; that by operation of law his contract has a retroactive effect, and takes date with the agreement—December, 1872. At that time he alleges the existence of two statutes of the state which gave him remedies for the legal and effectual enforcement of his contract, to-wit, the act, No. 69, A. D. 1869, and section 2743, Rev. St. 1870.

The act, No. 69, provides substantially as follows: That the judge rendering a judgment against any parish shall order the tax-assessing officers of the defendant parish to assess a special tax in amount sufficient to pay the judgment creditor; that said tax shall be forthwith collected and held as a special fund for the benefit of such creditor, and shall not be otherwise diverted; provided there are no other funds subject to such judgment in the parish treasury. The act, or section 2743, authorized the parishes in the state to levy and collect such taxes as may be deemed necessary by parish authorities to defray the expenses of the local government.

Having cited these two acts, he alleges that act No. 96, A. D. 1877, repealed them. This act limits the power of the parish so that not more than 10 mills can be collected for any purpose, and repeals all general laws authorizing the levy of any *special* or *judgment* taxes. In addition to the repealing statutes, he alleges that article 209 of the state constitution of 1879 limits the parish tax to 1 per centum on the assessment, and that the sum annually collected in the parish is used and needed for the alimentary purposes of the parochial government, and will furnish nothing with which to pay his claims; that said parish has no funds on hand, and no property subject to seizure.

He alleges that the powers and remedies the courts of the state had and would have exercised, under act No. 69 and section 2743, for the enforcement of the obligation of this contract, have been destroyed and taken away by the enactment of the subsequent acts and article of the state constitution; that these acts, No. 69 and section 2743, *now repealed*, entered into and were vital elements in his contract; that the state has by these subsequent repealing laws impaired the obligations of his contract, contrary to article 1, § 10,

of the constitution of the United States. He avers that his suit arises under the constitution of the United States. Defendant denies the jurisdiction of this court. His motion is now under consideration.

He urges that "plaintiff and defendant are citizens of the same state, and that plaintiff's demand and alleged contract, if any exists, can be enforced in the courts of the state of Louisiana under act No. 69, A. D. 1869; that said act, and remedy therein provided, was not repealed by act No. 96, 1877, nor by the provisions of the constitution of 1879.

After stating so much by way of denying jurisdiction, he adds in his motion that "it is the well-settled jurisprudence of the state that these repealing acts and article of the constitution do not affect the remedy or rights of parties under contracts entered into, as plaintiff's was, before the passage of act No. 96, 1877, or before the constitution of 1879." To sustain the suggestions in his motion he cites a number of cases reported in the Louisiana Reports. They will be noticed later. Defendant's objection to this court's jurisdiction, if confined to the suggestions in his motion, is very limited, and if the question was tried on an admission of all he says, it is doubtful if any circuit court would refuse jurisdiction to try plaintiff's suit since the passage of the act of congress of March 3, A. D. 1875.

He denies that act No. 69, so far as it affects the legal rights of the plaintiff claiming, as he does, under a contract, has been repealed; that the state courts, while allowing the repealing act of 1877 to fatally affect all persons not claiming under an anterior contract, will protect plaintiff from any loss of right or remedy in consequence of the repeal.

The fact of the repeal cannot be denied. The act, No. 69, certainly did exist as an operative law in A. D. 1872, and it is equally clear that act No. 96, of 1877, destroyed the remedies and powers under act No. 69, 1869, and section 2743 of Revised Statutes. The act, No. 96, 1877, limits and greatly reduces the per centum of taxation that the parish of Concordia could collect when plaintiff entered into his contract with defendant. The municipal law of the state which binds the parties to perform their agreement constitutes the obligation of a contract. These laws, existing at the time of the contract, must govern and control the contract in every shape in which it is intended they should bear on it, whether they affect the validity or construction of the contract.

The jurisdiction of this court cannot be tested, as it applies to this case, by the jurisprudence of the state courts, however much in the cases cited they may have sought to restrain the effect of the state statutes enacted subsequently to the date of plaintiff's contract. The state courts, of course, have ample power to try this case, or any other suits involving an interpretation of their statutes or constitution, and before the act of March 3, 1875, had original jurisdiction over such cases as this, to the exclusion of the federal courts. It is now conceded that that act is constitutional, and that congress intended under its operation to extend to the circuit courts of the United States all the judicial power which congress could, under the constitution, confer on such courts. The act enables this court to try, concurrently with the state courts, all suits of a civil nature, at common law or in equity, involving over \$500, "arising under the constitution or laws of the United States." Before the passage of the act of 1875 the supreme court only could, under its appellate power, examine and revise the decisions of the highest state courts when they, in a final judgment, passed on a "title, right, privilege, or immunity, specially set up or claimed by either party under the constitution of the United States."

In such cases, when the judgment was against the title, right, or privilege, the cause could go up on writ of error to the supreme court. Now it is no longer necessary, in order to reach the federal court, that a suitor, setting up any such right or privilege, should begin his action in the state courts. Such a right, privilege, or immunity makes up a federal question, and if his suit involves such a question he may begin it in this court.

The act of March 3, 1875, made some radical changes in the practice and jurisdictional powers of the circuit courts. The effect and extent of the change has not been fully realized, nor has the act, as yet, been comprehensively interpreted by the supreme court. One of the objects of the act, obviously, was to open the circuit courts to suitors claiming rights under the federal constitution and laws, and to enable such litigants to reach the courts of the United States without the tedious and oftentimes difficult process of an appeal on writ of error to the supreme court. May it not be a fact that all suits involving a federal question, which, prior to the act of 1875, could have been taken up on writ of error from the state courts of last resort to the supreme court, may now be filed and tried originally in the circuit courts? Certainly the counsel favoring this motion has

fallen far short in his estimate of the changes made by this act of 1875.

It must be admitted as true that plaintiff entered into the contract as alleged; that act No. 69, giving him certain remedies, and section 2743, Rev. St., existed at the date of his agreement; that the act, No. 96, 1877, and article 209 of state constitution, repealed the two statutes, No. 69 and section 2743. The motion to the jurisdiction cannot put at issue these facts as plaintiff alleges them. The constitution of the United States prohibits the impairment of the obligation of a contract. It does not, in such a way, protect the obligation of an ordinary debt.

If his cause of action was to enforce the collection of an account or an ordinary debt, then the allegation that certain laws affecting his remedy had been repealed would not present a federal question. His right to sue in this court attaches at once if he has presented such a question. It must depend on the subject-matter of his suit.

In *Osborn v. Bank*, 9 Wheat. 824, the court says the right to sue "is anterior to the defence, and must depend on the state of things when the action is brought." Can his right to sue depend on anything else? If the jurisdiction depends on or could be ousted by the character of the defence, or was limited by the denials in defendant's answer, should he file one, or by the matter or facts he should choose to put at issue, then it is apparent that the ingenuity of counsel would have much to do with confirming or denying jurisdiction. If it depended on the jurisprudence of the state courts, on similar issues to those involved in the case at bar, the power in this court to try such cases as this one would often rest on the opinions of the state judges. In this connection, it was suggested that defendant's answer, when filed, might admit the execution of the contract agreement, and put at issue only the question of performances on Sawyer's part. Then, on this limited issue, no federal question would have to be passed on, adversely or otherwise, by any court trying the case. This suggestion is answered in case of *Railroad v. Mississippi*, 102 U. S. 140, and in a number of cases of recent date. In the case noted the court said, speaking of the matter of jurisdiction:

"It is not sufficient to exclude the jurisdiction of the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States, but when a question, to which the judicial power is extended by the constitution, forms an ingredient of the original cause, it is within the power of congress to give the circuit court jurisdiction, although other questions of fact may be involved in it."

In *Mayor v. Cooper*, 6 Wall. 253, the court, discussing the same question, said:

"Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exists—if there be a single such ingredient in the mass—it is sufficient. That element is decisive upon the subject of jurisdiction."

Chief Justice Waite, in the case of *Gold Washing & Water Co. v. Keyes*, 96 U. S. 203, said:

"The suit must, at least in part, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved."

In *Osborn v. Bank*, 9 Wheat. 822, it is said the case arises under the constitution when "the title or right set up by the party may be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction."

It is clear that a federal question, or the ingredient of one, would not have to be passed on if plaintiff was suing on an obligation growing out of a debt or an account. But he sues on a contract, and invokes the protection of the constitution; and it seems that no exigible judgment could be given in his favor on any of the issues involved, unless the court pronouncing judgment should construe, one way or another, the article of the constitution prohibiting the impairment of the obligation of a contract. The repealing acts and article of the state constitution, which have impaired his remedies, must be annulled and put at naught, so far as they affect anterior contracts, before any exigible judgment can be given to plaintiff.

The original cause of action consists of a demand for the enforcement of the contract, and of a demand for and exigible judgment for the money due him. The "title or right he sets up for such a judgment cannot" be passed on without recognizing an existing "controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved." Unless an exigible judgment can be obtained, his suit in the state court would be an idle formula and a vain ceremony. Execution is the very life of a judgment; and now, under the act of 1875, he has a right to go into a court that has the power to give him an exigible judgment on all parts of his claim, if well founded.

The Louisiana cases cited by defendant's counsel show the existence of a distinctive constitutional question in this case. In the case of *Folsom v. City of New Orleans*, 32 La. Ann. 714, the court said,

speaking of the repealing act, No. 96, 1877, and of the effect of article 209, state constitution, that "no court has the right to question the validity of any article of a state constitution, except on the ground that it violates the constitution of the United States."

In the other cases the same principle was announced, and in all the cases the court held that act No. 69 was repealed, and that act No. 96, 1877, and article 209, would be valid against everybody but for the restraining effect which this construction of the paramount law exercised upon the validity of the act, No. 69, and article 209. In all the cases cited it is apparent that the state court was constrained to recognize the existence of a constitutional question, and to give judgment accordingly. In all of these suits, where a contract was established, the courts protected the claimants, on the ground that, in their opinion, the statute of 1877 and article 209 of state constitution violate the constitution of the United States. Plaintiff can, if he chooses, institute his suit in the state court, and all the elements of the cause of action, if well founded, could be sustained by an exigible judgment; but it is equally as clear to me that no exigible judgment could, in any court, state or federal, be given to him, unless the laws of which he complains as affecting his remedy are declared void, as against him, because of their repugnancy to the constitution of the United States.

I think the jurisdiction of this court covers the subject-matter of his suit.

Motion overruled.

NOTE.

FEDERAL QUESTIONS. Where there is a federal question involved, the circuit court has jurisdiction without regard to the citizenship of the parties. *Wilder v. Union Nat. Bank*, 12 Chi. Leg. News, 75. See *Wiggins' Ferry Co. v. Chicago & A. R. Co.* 11 FED. REP. 384; *Green v. Klinger*, 10 FED. REP. 692, and note. The United States court is the final arbiter of constitutional construction, and congress may invest it with the power to construe any constitutional law, (*Van Horne v. Dorrance*, 2 Dall. 304; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Ableman v. Booth*, 21 How. 506; S. C. 3 Wis. 1; *The Mayor v. Cooper*, 6 Wall. 247;) but for its power to extend to a constitutional question it must be in a case at law or in equity, (*Cohens v. Virginia*, 6 Wheat. 264.) The power of the United States court extends over statutes, whether passed by a state legislature or by congress, which are claimed to be in contravention of the constitution of the United States; but not to statutes claimed to be void under a state constitution, (*Calder v. Ball*, 3 Dall. 390; *Marbury v. Madison*, 1 Cranch, 137; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Wiggins' Ferry Co. v. Chicago & A. R. Co.* 11 FED. REP. 382;) and the objection must not be doubtful, (*U. S. v. Jackson*, 3 Sawy.

59; *People v. Brinkerhoff*, 68 N. Y. 259;) but the act must be clearly subversive of the constitution, (*Turner v. Althaus*, 6 Neb. 54; *Central C. R. Co. v. Twenty-Third Street R. Co.* 54 How. Pr. 168; *Remington v. Park*, 50 Vt. 178.)

OBLIGATIONS OF CONTRACT. The obligation of a contract is that which requires the performance of the legal duties imposed by it, (*Blaun v. State*, 39 Ala. 353;) and consists of that right or power over his will or action which a party by his contract confers on another, (*Ogden v. Saunders*, 12 Wheat. 213; *Lapsley v. Brashears*, 4 Litt. 47;) and includes everything within its object and scope, (*Sturges v. Crowninshield*, 8 Wheat. 122; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Blair v. Williams*, 4 Litt. 34; *Blanchard v. Russell*, 13 Mass. 1.) It does not inhere and consist in the contract itself, but in the law applicable to the contract, (*Edwards v. Kearzey*, 96 U. S. 595; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608;) and laws relating to the validity, construction, discharge, and enforcement are a part of the contract, (*Edwards v. Kearzey*, 96 U. S. 595; *Von Hoffman v. Quincy*, 4 Wall. 535; *McCracken v. Hayward*, 2 How. 608;) the validity, construction, and remedy being part of the obligation, (*Green v. Biddle*, 8 Wheat. 1; *People v. Bond*, 10 Cal. 570; *Story v. Furman*, 25 N. Y. 223; *Walker v. Whitehead*, 16 Wall. 314.) The obligation of a contract commences at its date, (*Blair v. Williams*, 4 Litt. 34;) and depends on the laws in existence when it is made, (*Robinson v. Magee*, 9 Cal. 84; *Johnson v. Duncan*, 3 Mart. 531; *West. Sav. Fund v. Philadelphia*, 31 Pa. St. 175; *Wood v. Wood*, 14 Rich. 148; *Smith v. Cleveland*, 17 Wis. 556;) and continues until the debt is paid, or the act performed, (*Baily v. Gentry*, 1 Mo. 164; *Forsyth v. Marbury*, R. M. Charl. 324;) and extends to future possessions, (*Edwards v. Kearzey*, 96 U. S. 595.) The obligation of other things than contracts is not within the protecting clause of the constitution, (*Ogden v. Saunders*, 12 Wheat. 213; *Robinson v. Magee*, 9 Cal. 84; *Blair v. Williams*, 4 Litt. 34.)

IMPAIRMENT OF OBLIGATION. To impair means to alter so as to make the contract more beneficial to one party and less to the other than by its terms it purports to be. *Bailey v. Gentry*, 1 Mo. 164. The impairment is not a question of degree, manner, or cause, (*Green v. Biddle*, 8 Wheat. 1; *Planters' Bank v. Sharp*, 6 How. 301; S. C. 12 Miss. 17; *Walker v. Whitehead*, 16 Wall. 314; S. C. 43 Ga. 538; *Von Hoffman v. Quincy*, 4 Wall. 535; *Gault's Appeal*, 33 Pa. St. 194; *Farnsworth v. Reeves*, 2 Cold. 111; *Winter v. Jones*, 10 Ga. 190;) it cannot be impaired in the remotest degree, (*Green v. Biddle*, 8 Wheat. 1; *Von Hoffman v. Quincy*, 4 Wall. 535.) Where a contract is discharged, (*Farmers' & Mech. Bank v. Smith*, 6 Wheat. 131,) or where it is destroyed, (*Robinson v. Magee*, 9 Cal. 84,) or an essential part is annulled, (*New Jersey v. Wilson*, 7 Cranch, 164,) or partially rescinded, (*Grinnball v. Ross*, T. U. P. Charl. 175,) the obligation is impaired. The obligation is impaired by a statute which authorizes its discharge by a smaller sum, or at a different time, or in a different manner than stipulated, (*Golden v. Prince*, 5 Hall, L. J. 502; *Edmonds v. Ferguson*, 11 Mo. 344.) A state can no more pass a law violating the obligation of a contract by means of a convention than by its legislature, (*Marsh v. Burroughs*, 1 Woods, 463; see *Pacific R. Co. v. Maguire*, 20 Wall. 36;) so a provision in a state constitution which prohibits the enforcement of a contract is void, (*White v. Hart*, 13 Wall. 646; S. C. 39 Ga. 306; *French v. Tom-*

lin, 19 Amer. L. Reg. 641; *Jacoway v. Denton*, 25 Ark. 625; *McNealy v. Gregory*, 13 Fla. 417; but see *Shorter v. Cobb*, 39 Ga. 285; *Armstrong v. Lecompte*, 21 La. Ann. 528; *Dranquet v. Rost*, Id. 538.) A mere license given by charter to an incorporated company is not a contract, (*Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, Id. 659;) so a provision in a constitution prohibiting lotteries is not an impairment of the obligations of a contract, (*Stone v. Mississippi*, 101 U. S. 814.)

The remedy enters into and forms a material part of the obligation of the contract. *Von Hoffman v. Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 Wall. 314; S. C. 43 Ga. 558; *Gunn v. Barry*, 15 Wall. 610; S. C. 8 Bank Reg. 1; *Johnson v. Higgins*, 3 Metc. (Ky.) 566. The validity and remedy are inseparable, and both are parts of the obligation, (*Walker v. Whitehead*, 16 Wall. 314; S. C. 43 Ga. 537; *Scaine v. Bellville*, 39 N. J. Law, 526;) and a statute which enfeebles (*Edwards v. Kearzey*, 96 U. S. 595) or impairs the remedy, (*Bronson v. Kinzie*, 1 How. 311; *Green v. Biddle*, 8 Wheat. 1; *Smith v. Morse*, 2 Cal. 524; *Johnson v. Duncan*, 3 Mart. 531; *Coffman v. Bank*, 40 Miss. 29,) or lessens the efficiency of the remedy, (*Louisiana v. New Orleans*, 102 U. S. 203,) where the remedy is essential, (*Thompson v. Com.* 81 Pa. St. 314,) is prohibited.

The character of the parties to a contract does not prevent the application of the inhibitory provision of the constitution as to the impairment of the obligation of contracts. *Trustees v. Rider*, 13 Conn. 87; *Regents v. Williams*, 9 Gill & J. 365. So a contract wherein the state is a party is within the protecting clause of the constitution. *Hall v. Wisconsin*, 103 U. S. 5. This provision of the constitution is a limitation on the taxing power of the state, as the taxing power enters into and becomes a part of the obligation of the contract, (*U. S. v. Jefferson County*, 7 Cent. Law J. 130,) and a law changing the stipulation of a contract, or relieving a debtor from a strict and literal compliance with its requirements, is unconstitutional. *Murray v. Charleston*, 96 U. S. 432. So corporations are within the provisions of this section of the constitution as a part of the general law. *Fletcher v. Peck*, 6 Cranch, 87; *State v. Wilson*, 7 Cranch, 164; *Terret v. Taylor*, 9 Cranch, 43; *Town of Pawlett v. Clark*, Id. 292; *Green v. Biddle*, 8 Wheat. 1; *Astrom v. Hammond*, 3 McLean, 107; *Woodruff v. Trapnall*, 10 How. 190; *Derby T. Co. v. Parks*, 10 Conn. 522; 13 Ired. 75; *Stanmire v. Taylor*, 3 Jones, (N. C.) 207. As long as a city exists laws are void which withdraw or restrict its taxing power so as to impair the obligation of her contracts made on a pledge impliedly or expressly given. *Von Hoffman v. Quincy*, 4 Wall. 535; *Wolf v. New Orleans*, 103 U. S. 358.—[Ed.]

NORTON v. Hood and others.*

(Circuit Court, E. D. Louisiana. May, 1882.)

1. APPEAL—REV. ST. § 631.

An appeal from the district court to the circuit court only lies, under section 631 of the Revised Statutes of the United States, when the decree of the former court is final.

2. APPEAL—INJUNCTION.

The granting or refusal of an injunction is in the discretion of the court, and such interlocutory orders are not appealable.

On Motion to Dismiss the Appeal.

E. H. Farrar, John D. Rouse, and Wm. Grant, for complainant.

John A. Campbell and H. G. Morgan, for defendant.

PARDEE, C. J. In this case a motion has been filed to dismiss the appeal for want of jurisdiction, for the reason that the decree of the district court is not final. Rev. St. § 631. The record shows that in 1866 one Govey Hood, being the owner of certain plantations, confessed judgment in favor of Henry Frellson for a large sum; that on the judgment so confessed execution was taken out, and in 1868, in September, the plantations were sold by the sheriff and adjudicated to Frellson as the purchaser; that in December, 1868, Hood went into bankruptcy and was discharged therein, January, 1871; that after Hood's discharge in bankruptcy Frellson conveyed, by act of sale, certain of the plantations to Hood, retaining a mortgage thereon and vendor's lien to secure the payment of the notes given for the purchase price, running through several years. The said notes being unpaid and Hood in default, the said Henry Frellson, in 1874, sued out in the [state] district court of Carroll parish executory process to enforce the mortgage on the lands in the parish. Hood obtained an injunction and a controversy ensued, which was terminated by its dismissal in the supreme court of the state in May, 1879. *Frellson v. Hood*, 31 La. Ann. 577.

The supreme court dismissed Hood's petition for its demerits. He charged Frellson and himself as fraudulent conspirators to defraud the creditors of Hood, and that all they had done had been done with that object. His allegations of his own turpitude debarred him from a hearing, and condemned him and his pretensions, as is seen by the judgment of that court. Some weeks after this, Norton, the assignee in bankruptcy of Hood, filed a bill in the district court of the same

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

general features as the suit of Hood, and asking for a decree. Upon this bill the district judge granted an order to show cause why an injunction should not issue, and made a restraining order upon Frellson and the sheriff of Carroll parish, to operate pending the hearing for injunction, not to sell under the executory process issued in that court in 1874, and which Hood had enjoined, and which was then ripe for execution by the sheriff upon the dismissing of the injunction of Hood by the supreme court. The rule for an injunction was never heard, and the restraining order was continued until the decree appealed from was made. The suit in the district court of the United States came on for a hearing in 1881 on the bill, supplemental bill, answer of Frellson, replication, exhibits, and testimony. The decree rendered was to the following effect:

(1) Declaring the judgment in favor of Frellson against Hood in 1866, and the execution thereon in 1868, with the sales and conveyances by the sheriff, to have been established as valid and operative, without fraud, etc., and that Frellson took the property so conveyed discharged from any claim of Hood's assignee in bankruptcy. (2) Whatever surplus there might be from the sale of the property under the process of the state court in favor of Frellson should not be paid to Hood, but to Hood's assignee, after deducting such cost as the court may decree out of the same. (3) That the injunction heretofore allowed restraining the execution of the process be dismissed, and that the sheriff is permitted to proceed and execute the same; but, under the direction of this court, to dispose of the surplus that may remain in his hands after the payment of the debt therein specified as due to said Frellson and costs of suit as above directed. (4) Granting leave to complainant to apply for further orders regulating the sale in time and as to the appraisement, and sale upon credit, according to the laws of the state of Louisiana. (5) Directing the sheriff to make a return to the district court of the sale allowed, and reserving the question of costs until the coming in of such returns.

From this decree the complainant has taken a general appeal, bringing up the whole case.

A critical examination shows the court decided only (1) the validity of the mortgages, sales, and conveyances from Hood to Frellson prior to the bankruptcy of Hood; (2) partly refusing and partly granting the injunction *pendente lite* prayed for; and to that extent dismissing the restraining order.

The court did not decree anything (1) with regard to the validity of the mortgage from Hood to Frellson, granted after Hood's discharge in bankruptcy, which mortgage Frellson was foreclosing in the state court; (2) nor anything for or against Hood or the sheriff, both of whom are evidently retained in court for a final decree; (3) nor was the bill dismissed, nor the costs settled, nor any sale of property

ordered or enjoined. In short, it appears to me that the sole effect of the decree rendered was to refuse to grant the injunction prayed for, restraining the sheriff from executing the process of the district court of Carroll parish, for which refusal the court gave a reason, not that the court was without jurisdiction, but the better one, perhaps, that Frellson was not shown to have been guilty of fraud in acquiring the original title to the property in controversy.

The court had no jurisdiction to issue the injunction. See sections 720, 5106, Rev. St.

The issue of an injunction or the dissolution of an injunction is in the sound discretion of the court, and the interlocutory orders of the court therein are not appealable. *Thomas v. Wooldrige*, 23 Wall. 288; *Young v. Grundy*, 6 Cranch, 51; *Verden v. Coleman*, 18 How. 86; *Moses v. The Mayor*, 15 Wall. 390.

Of course, the whole contention in this case is whether the decree appealed from is final. There can be no claim that it is final between any other parties than Norton and Frellson, and it will be noticed that no special appeal is taken, but the whole case is appealed. Counsel for appellants rely upon the cases of *Forgay v. Conrad*, 6 How. 206, and *Thomson v. Dear*, 7 Wall. 342, which hold as follows:

"Where the decree decides the right to the property in contest, and directs it to be delivered up or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be necessary by a further decree to adjust the account between the parties."

Giving the decree in this case the greatest effect it can possibly have,—and perhaps it decides against the complainant as to the validity of Frellson's original title to the property in controversy, but it does not direct the property to be delivered up, nor to be sold,—and there is nothing in the decree to be executed immediately or remotely, not even *fi. fa.* for costs. The other cases cited by appellant's counsel (*Railroad Co. v. Bradleys*, 7 Wall. 575; *Stovall v. Banks*, 10 Wall. 583; *Com'rs v. Lucas*, 93 U. S. 108; and *Huntington v. Consolidated Association*, not reported) are cases in which the several decrees rendered were held to be such final decrees that an appeal would lie, and are within the rule of *Forgay v. Conrad*. In *Railroad Co. v. Bradleys* the decree directed a sale of property, and the bringing of the proceeds into court, as well as dissolved the injunction outstanding. In *Stovall v. Banks* the decree appealed from adjudged a certain sum of money to be due, and awarded execution. In *Com'rs v. Lucas* an injunction was dissolved and the complaint dismissed.

In *Huntington v. Consolidated Association* receivers were discharged, and property ordered to be transferred and delivered up to defendants. It is easily seen that none of these cases affect the case under consideration.

On the other hand, in *Crosby v. Buchanan*, 23 Wall. 420, it is said:

"Cases cannot be brought to this court in parcels. We must have the whole case or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed; but until all the rights of the parties have been finally passed upon and settled, this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree."

See, also, *Beebe v. Russell*, 19 How. 287; *Montgomery v. Anderson*, 21 How. 386; *Ogilvie v. Knox Ins. Co.* 2 Black, 539; *Humiston v. Stainthorp*, 2 Wall. 106; *Wheeler v. Harris*, 13 Wall, 51; *Green v. Fisk*, 103 U. S. 518.

Appellants' counsel urge that the decree in this case finally disposes of Hood's rights. I can not so understand it. The decree refuses to enjoin the process sued out by Frellson against Hood in the state court, but leaves it optional with the parties to go on with that process. If they do go on and proceed to a sale, the district court will regulate the manner of sale and distribute the surplus proceeds. Suppose Frellson and Hood settle their differences, either by Frellson taking the property in payment or by Hood's paying the mortgage, or any other arrangement is made outside of a sale, under a particular order of seizure and sale, how are Hood's rights affected?

To recapitulate: the decree appealed from does not condemn any one to pay any money, direct the sale or delivery of any property, fix any person's liability for money or property, order the performance or non-performance of any act, dismiss the complainant's bills, nor determine the costs. It is a decree with nothing to execute, and from its many directions and reservations was probably not intended as a final decree settling the rights of the parties. From the standpoint of irreparable injury the decree is not final.

It is therefore ordered that the appeal in this case be and the same is dismissed, with costs.

NOTE. To authorize an appeal under section 631, Rev. St., the decree must be a final decree, (*Mordecai v. Lindsay*, 19 How. 199; *The Seneca*, Gilp. 34;) and final decrees refer to cases of equity and admiralty or maritime jurisdiction exclusively, (*U. S. v. Nourse*, 6 Pet. 470.) So no appeal lies from a judgment in an action on an official bond, (*U. S. v. Haynes*, 3 McLean, 155;) nor from a proceeding to condemn property seized on land for a violation of the revenue laws, (*U. S. v. Barrels*, 1 Woods, 19.) If there are two decrees, one declaring to whom a fund belongs and the other declaring the amount due, and appropriating the fund, the latter is the final decree, (*Cushing v. Laird*, 15 Blatchf. 219.) So an appeal lies from a decree upon a petition by an informer to obtain a share of a fund in court, (*Westcot v. Bradford*, 4 Wash. C. C. 492;) or from a decree on an information *in rem* to enforce a forfeiture, (*U. S. v. La Vengeance*, 3 Dall. 297.) The circuit court will not entertain an appeal from a *pro forma* decree entered without a hearing, (*The Wellington*, 21 Int. Rev. Rec. 14;) nor a provisional decree, (*The Yuba*, 4 Blatchf. 314;) nor an interlocutory decree, (*The New England*, 3 Sumn. 195.) An application to the conscience and discretion of the court is not the legitimate subject of an appeal. *The Enterprise*, 3 Wall. Jr. 58. So an appeal cannot be taken from a final decree on an application for an injunction, (*U. S. v. Nourse*, 6 Pet. 470; *contra*, *Porter v. U. S.* 2 Paine, 313;) or for a decree dismissing a libel for want of prosecution, (*The Merchant*, 4 Blatchf. 105;) or for a refusal to quash an execution, (*The Hiram Wood*, 6 Chi. Leg. News, 135;) or on an application for a stay of execution, (*The Hollen*, 1 Mason, 431;) or an application for a rehearing, (*The Enterprise*, 3 Wall. Jr. 58;) or for an allowance or disallowance of a bill of review, (*The New England*, 3 Sumn. 495;) or on an application to allow an appeal *nunc pro tunc*, (*The Enterprise*, 3 Wall. Jr. 58.)

To authorize an appeal to the circuit court the amount in dispute must exceed the value of \$50, exclusive of costs. *The Seneca*, Gilp. 34. So, in salvage cases, (*The Roarer*, 1 Blatchf. 1,) if the claim, with interest, amounts to more than \$50, appeal lies from the decree, (*Godfrey v. Gilmartin*, 2 Blatchf. 340.) When the controversy relates merely to the amount of money, the amount in dispute must appear in the pleadings, (*Agnew v. Dorman*, Taney, 386;) and if libellant admits that the real demand is for less than the sum limited, while the claim in the libel is for more than that amount, the libellant will be subjected to the infliction of costs, (*McGinnis v. Carlton*, 1 Abb. Adm. 570;) and if he acquiesces in a decree for less than \$50 the respondent cannot appeal although a larger sum was claimed, (*Greigg v. Reade*, Crabbe, 64; *Shirley v. Titus*, 1 Sumn. 147;) and the libellant may appeal from an amount above the limited sum, whatever be the recovery, (*McGinnis v. Carlton*, 1 Abb. Adm. 570;) but if he is not entitled to any decree, appeal will not lie to a decree refusing him costs, (*Taylor v. Woods*, 3 Woods, 146.) If a libel for assault and battery does not lay any amount as *ad damnum* the libellant cannot appeal from a decree in his favor for a sum less than \$50. *Jenks v. Lewis*, 3 Mason, 503.

The appeal must be taken to the next term of the circuit court after rendition of the decree. *U. S. v. Hogsheads*, 1 Curt. 276; *The Hollen*, 1 Mason, 431; *Gloucester Ins. Co. v. Younger*, 2 Curt. 322; *The Oriental*, 9 Chi. Leg. News, 321; *The Glamorgan*, 2 Curt. 236; *U. S. v. Spectie*, 1 Woods, 14. If appellant

fails to prosecute his appeal to the next term of the circuit court, he will be deemed to have abandoned it, (*The Betsey*, 1 Gall. 416; *U. S. v. Haynes*, 2 McLean, 155;) and the court will, at the instance of the respondent, affirm the judgment, (*Folger v. Shaw*, 1 Woods & M. 531;) and the appellee must apply for relief to the circuit and not to the district court, (*The Josephine*, 1 Abb. Adm. 481.)—[Ed.]

UNITED STATES *ex rel.* WATSON *v.* PORT OF MOBILE.*

(*Circuit Court, S. D. Alabama.* June, 1882.)

1. MUNICIPAL CORPORATION—SUBSEQUENT LEGISLATION.

A judgment having been rendered against a municipal corporation, subsequent legislation by the state, restricting the powers of the administrative officers of such corporation, must be disregarded so far as it impairs the remedy of the judgment creditors.

2. SAME—SAME.

Where, at the time of the contract, a creditor of a municipal corporation had a right, after obtaining a judgment against the corporation, to compel by *mandamus* the officials of the corporation to levy a tax to pay this judgment, if the legislature of the state abolishes that corporation and creates another in its place before the creditor obtains judgment, he may proceed to judgment against the new corporation, and compel (by *mandamus*) the taxing power thereof to levy a tax to pay the judgment. As long as his remedy is unaffected he cannot complain of the legislation.

PARDEE, C. J. The relator having brought suit in this court against the respondent, the corporation known as the port of Mobile, as the successor of the corporation known as the mayor, aldermen, and common council of the city of Mobile, on certain bonds issued by the latter, under legislative authority, to aid in the construction of the Mobile & Great Northern Railroad Company, recovered an absolute judgment. Failing to collect his judgment by *fi. fa.*, he has sued out a *mandamus* to compel the board of police, the authorities of the port of Mobile, to assess, levy, and cause to be collected a sufficient tax on the taxable property within the corporation to pay his judgment and costs. To the alternative writ the respondents have demurred on the ground that the legislation referred to in the petition does not require the defendants named, as police commissioners of Mobile, to cause to be assessed, levied, and collected the taxes which the petition prays to have assessed, levied, and collected. Without waiving demurrer respondents then filed a return, admitting the judgment to have been rendered as claimed, the issuance of execution, and its return unsatisfied, and the contract under which the bonds

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

were issued, but denying that the port of Mobile is the successor of the old corporation, bound for its debts and duties, that the respondents have any legal right to levy and cause to be collected the tax demanded, and averring that by the charter of the port of Mobile they are restricted in the amount and purposes of taxation, that the present territorial limits of the port of Mobile do not embrace one-half of the territory contained in the old corporation when the bonds were issued, and that relator should proceed by equity, etc. To this return the relator has demurred on several grounds, mainly for its insufficiency. The case is submitted on both demurrers. The liability of the port of Mobile for the relator's judgment is settled by the judgment; all questions in the case back of that judgment are *res adjudicata*. See *U. S. v. New Orleans*, 98 U. S. 395; *Wolff v. New Orleans*, 103 U. S. 360.

The judgment settles all questions as to changes of municipal territory, as to the successorship of the port of Mobile to the old corporation, and as to the full and absolute liability of the port of Mobile to pay the debt due relator, as ascertained by judgment. The judgment having been rendered in June, 1880, the legislation of the state of Alabama (passed in 1880, 1881) thereafter, restricting the powers of the police board of the port of Mobile in reference to the amount and purposes of taxation, must be disregarded, so far as it impairs the relator's remedy under his judgment. The question, then, in this case, may be reduced to this: Has the legislation of 1879 of the state of Alabama the effect of taking away the relator's contract right to have the taxing authority of the city of Mobile levy and collect a sufficient tax to pay and satisfy his bonds and interest? As I understand this case, but for that legislation his right would be indisputable, (see 36 Ala. 410;) and it may be, as counsel for respondents argue, that the relator has the right to claim the whole legislation unconstitutional, null, and void, so far as it affects relator, under both the state and federal constitution; but I do not think that the conclusions of counsel necessarily follow, *i. e.*, that the old corporation and its officers should be kept in existence for the purpose of enforcing relator's contract, and that relator, having submitted to the legislation so far as to recover his judgment against the new corporation as the successors of the old, is bound to the full extent of the legislation. An examination of the acts of 1879 in question, keeping in view the force and effect of the judgment aforesaid, shows that the substantial effect of the legislation, as far as relator is concerned, may be reduced to the

following: The corporate name has been changed; the corporate officers are changed as to persons, title, and duties; the outstanding debts and obligations, as well as all assets and property of the corporation, are put into the hands of commissioners and chancery court for liquidation and settlement, and a limitation is placed on the amount of taxation. Now, the relator may be bound to take notice of these matters, but none of them affect injuriously his contract, as the case is made up by the judgment and answer of respondents; for the judgment fixes the liability, and the answer does not show that the taxation as limited is insufficient to furnish the alimony of the city and pay relator's demands besides. I think no one will claim that if the aforesaid changes had been brought about by amendments to the old charter, as they might have been, that relator would have lost his remedy thereby. How, then, can he have lost it now? The substance of relator's contract is that the taxing authority of the corporation shall levy and collect a certain amount by taxation to meet his demands. It can be of no moment to him what particular officers shall exercise that taxing power, or what may be the particular title of the officer, or the particular name of the corporation, provided it is the same corporation or body he has contracted with. These matters are within the legislative control, and as long as relator's remedy is not affected he cannot complain. The respondents in this case have now the taxing power of the corporation bound to the relator. It would seem that they should be compelled to perform their duties under the contract.

That the alternative writ reads "to assess, levy, and cause to be collected a special tax," etc., has been made the ground for considerable argument, it being claimed that respondents have nothing to do with the assessments of property, *i. e.*, valuation of property, for taxing purposes, and nothing to do with the collection of taxes. I do not understand the words "assess" and "levy," in the writ, to apply to the valuation of taxable property for taxing purposes, but to mean to lay a tax on the taxable property as the same is already valued for ordinary taxing purposes, no matter whether such taxation tableau is made up by the state or city authority. The charter of the city gives the respondents certain powers and control over the tax collector, such as his appointment and removal in certain cases, and the designation of his duties. "Cause to be collected," as used in the writ, evidently means that so far as respondents have control over the performance of duties by the tax collector they shall exercise that control in favor of the collection of the tax. The case of *Ex parte*

Rowland goes to the extent of holding them excused when they have performed their duties under the law in the premises.

Following the line of argument on which this case has been presented, it therefore seems clear that the *mandamus* asked should be made peremptory, but it is a very grave question whether so much argument is necessary.

If we take the case of *Wolff v. New Orleans, supra*, it seems that the judgment rendered in favor of relator against the port of Mobile is conclusive as to all the defences set up against the *mandamus*. When the bonds were issued upon which the judgment was received, the city was by its charter "invested with all the powers, rights, privileges, and immunities incident to a municipal corporation, and necessary for the proper government of the same," and it could have provided the means by taxation for their payment when they became due. The judgment in this case fixes the *status* and liability of the "port of Mobile" as the same corporation that issued the bonds and contracted for their payment. The municipal body that created the obligations upon which judgment of the relator was recovered existing, with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the court can act. The court, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by *mandamus* compel, at the instance of the parties interested, the exercise of that power, as if no such legislation had ever been attempted. This reasoning ought to be conclusive against the port of Mobile, as it was against the city of New Orleans, whose charter had also been repealed and a new one with widely-different boundaries granted her, whose government and officers had been entirely changed in name and duties, and who also had been granted a limit on municipal taxation. The question raised under the authority of *Heine v. Levee Com'r*, 19 Wall. 655, and *Barkley v. Levee Com'r*, 93 U. S. 258, are manifestly settled by the judgment of relator, which found the responsible debtor in existence, which the court can act on. *Morgan v. Beloit*, 7 Wall. 613, was an entirely different case from this, and conflicts in nowise with any proposition advanced here.

Considering all of the foregoing reasons, judgment will be entered overruling demurrer to petition for *mandamus*, sustaining demurrer to respondent's answer, and making the *mandamus* herein peremptory, with costs.

NOTE. The charter of a public corporation, created for the purposes of government, cannot be considered a contract, (*Bradford v. Cary*, 5 Me. 339; *Marietta v. Fearing*, 4 Ohio, 429; *Governor v. Gridley*, 1 Miss. 328; *People v. Morris*, 13 Wend. 525; *Dartmouth College v. Woodward*, 4 Wheat. 694; *East Hartford v. Hartford Bridge*, 10 How. 511,) and the grant of the franchise may at any time be resumed, (*People v. Pinckney*, 32 N. Y. 377.) A power to alter and change public corporations, and to adapt them to the purposes intended, is implied. *State v. Railroad*, 3 How. 534; *Amey v. Allegheny City*, 24 How. 364; *Trustees v. Tatman*, 13 Ill. 27; *Bridgeport v. Hubbell*, 5 Conn. 237; *Bush v. Shipman*, 5 Ill. 186; *Mills v. Williams*, 11 Ired. 558; *Gutzwiller v. People*, 14 Ill. 142; *North Yarmouth v. Skillings*, 45 Me. 133; *Mayor v. State*, 15 Md. 376. But see *Trustees v. Aberdeen*, 21 Miss. 645; *Bristol v. New Chester*, 3 N. H. 524; *Paterson v. Society*, 24 N. J. Law, 385; *St. Louis v. Russell*, 9 Mo. 507; *People v. Morris*, 13 Wend. 325. Transactions between the legislature and municipal corporations are in the nature of legislation rather than of compact. *Hartford v. Hartford Bridge Co.* 10 How. 511; *Trustees v. Tatman*, 13 Ill. 27; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Police Jury v. Shreveport*, 5 La. Ann. 661; *Layton v. New Orleans*, 12 La. Ann. 515. A statute may prescribe a remedy, if there be none; and if a remedy given be as good as that taken away, the obligation is not impaired. *Mason v. Haile*, 12 Wheat. 370; *Milne v. Huber*, 3 McLean, 212; *Simmons v. Hanover*, 23 Pick 188; *Commercial Bank v. State*, 12 Miss. 439; *Wheat v. State*, Minor, 199; *Anon.* 2 Stewt. 228; *Bronson v. Kinzie*, 1 How. 311; *Davis v. Ballard*, 1 J. J. Marsh. 563; *McMillan v. Sprague*, 4 How. (Miss.) 647; *Lapsley v. Brashears*, 5 Litt. 47; *Townsend v. Townsend*, Peck, (Tenn.) 1; *Sav. Inst. v. Makin*, 23 Mo. 360; *Longfellow v. Patrick*, 25 Me. 18; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *In re Trust. Pub. Sch.* 31 N. Y. 574; *Morse v. Goold*, 11 N. Y. 281; *Pratt v. Jones*, 25 Vt. 303.

States may pass remedial laws, but not such as impair vested rights, or create personal liabilities, or impose new obligations or duties. *Braddow v. Green*, 7 Humph. 130; *Rich v. Flanders*, 39 N. H. 304; *De Cordova v. Galveston*, 4 Tex. 470; *Hope v. Johnson*, 2 Yerg. 125; *Vanzandt v. Waddell*, Id. 260; *Coffin v. Rich*, 45 Me. 507; *Kennebec Purch. v. Laboree*, 2 Me. 275. So long as contracts are submitted to the ordinary and regular course of justice, and existing remedies are preserved in substance, the obligation of the contract is not impaired, (*Holmes v. Lansing*, 3 Johns. Cas. 73;) but if the change materially affects rights and interests it is so far a violation of the compact, (*Green v. Biddle*, 8 Wheat. 1; *Von Hoffman v. Quincy*, 4 Wall. 535; *Billings v. Riggs*, 56 Ill. 483.) A state legislature may regulate the remedy and mode of proceeding of past as well as future contracts, but not so as to take away all remedy. *Ex parte Pollard*, 40 Ala. 77.—[Ed

FARMERS' LOAN & TRUST CO. v. GREEN BAY & MINN. R. CO.

(Circuit Court, E. D. Wisconsin. July 7, 1882.)

NEGLECTENCE—DAMAGES FROM INJURY TO LANDS.

Corporations acquiring title to lands along the line of a railroad may recover damages for injuries to such lands arising from the negligence of the receiver of such road and his agents engaged in operating the line, notwithstanding they acquired such title for purposes foreign to the object of their creation. Such fact is no defence to an action for damages for injury to their lands.

Cate, Prentiss & Noyes, for petitioner.

Larned & Larned, for receiver of railroad.

HARLAN, Justice, (*orally*.) In this case, pending in the circuit court of the United States for the eastern district of Wisconsin, the Scranton Manufacturing & Boom Company and the Dexterville Manufacturing & Boom Company, corporations created under the general laws of Wisconsin, heretofore filed petitions in this cause, asserting claims against the receiver of the railroad company for damages done from time to time by fire to certain lands by them respectively owned.

The petitions, in substance, allege that the lands were, in part, covered with pine forests, suitable for saw logs, and other kinds of useful and valuable timber, and other portions thereof were what is commonly known as cranberry marshes and grass lands, and as such were valuable. The claims were rested upon the ground that the railroad which passed through the lands described was, upon the part of the receiver and the employes, so carelessly and negligently maintained that coals and sparks of fire escaped from passing locomotives, causing numerous fires on the track and right of way, upon which the receiver had carelessly and negligently allowed to be accumulated and remain, a large quantity of combustible and inflammable material, dangerous to the adjoining property of petitioners; also that these fires were negligently permitted to spread and extend from the line of the railroad to and upon the lands of petitioners. It was alleged, among other things, that the locomotives used by the receiver were not properly constructed and repaired, or provided with spark-arresters, and were so negligently operated as to cause the fires to which reference has been made.

By an order entered on the twenty-sixth of July, 1881, these claims were referred to a special master for examination and report thereon. Upon the claims of each company the master made a report, allowing some and disallowing others. He finds, among other things, that

the Scranton Manufacturing & Boom Company sustained damages by reason of fires, through the destruction of cranberry vines growing upon its lands, to the amount of \$2,000; and that the Dexterville Manufacturing & Boom Company sustained damages from the same cause, and in like manner, to the amount of \$1,500. In each case his finding is that the fires were the result of negligence upon the part of the receiver, his agents, and employees.

Upon exceptions to the master's reports his findings have heretofore been approved by the district judge. The present hearing is had before the circuit justice and the district judge, and counsel have been permitted to reargue only certain questions of law, viz.: (1) Whether these corporations are permitted by their charters to acquire lands for the purpose of cultivating cranberry vines, and with reference to their being so cultivated. (2) If not, can they be heard to assert claims for damages done to such vines? Counsel for the receiver maintains the negative of each of these propositions.

The learned counsel for the receiver insist with much confidence that their position is sustained by a ruling heretofore made by me in *Timothy v. Kelly*. Let us see what that case was. It appeared that Kelly, Ketchum, and Hiles held the title to various tracts of land, aggregating more than 400 acres, lying along and covering a part of the line of the Green Bay & Minnesota Railroad Company. The object of that suit was to obtain a decree compelling the defendants therein to surrender the title to those lands to the company or to its receiver. The ground upon which the receiver there proceeded was that the several tracts were in fact donations by the respective grantors to the railroad company, with a view as well to aid in the construction of the road as for the purpose of securing the location of depots, whereby the grantors expected to derive profit; that the defendants, in view of their official relations to the railroad at the time of the donations, as well as at the time the deeds were executed, were forbidden by law from taking title to themselves; that the taking of title to themselves, under the circumstances, was a fraud as well upon the company as upon the grantors, and in violation of the intention of the grantors. I found that Kelly and others had obtained title to the lands there in question under the circumstances charged; that is, that their grantors intended to make donations of the land to the company, and that there was no purpose on their part, as Kelly and Ketchum well knew, to convey the title to them, except as representatives of the company. The difficulty I had in that case was as to the extent of the relief which

could be given to the railroad company. The company by its charter was made capable of acquiring for its legitimate use for railroad purposes a fee-simple in lands, tenements, or easements in the same, and of conveying any such estate or interest. It was authorized through its officers to enter upon land for the purpose of locating the route of its railroad, and, the route being located, to enter upon, take possession, occupy, and use any land along and including its line of road, not exceeding 100 feet in width and outside of its right of way; also, to take and occupy other lands which might be necessary for its use for the purpose of erecting depot buildings, stopping stages, station-houses, freight-houses, ware-houses, engine-houses, machine-shops, or for buildings or fixtures of any kind, or grounds about such buildings, houses, or fixtures, for the convenient operation of the business of the road. The company's charter further declared that all private property which it was authorized to take was deemed to be taken for public use. It was ruled in that case that the company needed and could use for railroad purposes only a very small part of the lands, the title to which Kelly and Ketchum had improperly taken to themselves; that it had no power to condemn land for any purpose except railroad purposes; and that it could not take the title to lands for merely speculative or farming purposes. It was consequently adjudged that the court would not lend its aid to the company to acquire title to land which it could not have condemned for railroad purposes, and the title to which the company could not consistently with its charter have acquired. The duty of the court to withhold its aid in that direction was regarded none the less imperative because the defendants had used their official relations with the company to acquire title in themselves. The court, however, recognized the company's right to relief as to such portion of each tract as was contiguous to its several depots and necessary for its use for legitimate railroad objects, including right of way and depot grounds. To that end and for that purpose the cause was sent to a special master to take proof and report. This statement of what was decided in the *Kelly* suit is, I think, quite sufficient to show the inapplicability of the ruling there made to the case in hand. Now the contention of counsel is that these manufacturing and boom companies could not lawfully acquire land for the purpose of maintaining and cultivating cranberry vines, and the court having ruled in the *Kelly* case that the law would not aid the corporation to acquire land, the title to which it could not lawfully take and hold, must now, to be consistent, rule that petitioning corporations having, as is claimed,

acquired title to land for purposes foreign to the object of their creation, cannot recover damages for injuries to such land arising from the negligence of the receiver and his agents engaged in the operation of the railroad. To this proposition the court is unable to give its assent. It cannot be sustained on principle or authority. *Nat. Bank v. Mathews*, 98 U. S. 621; *Nat. Bank v. Whitney*, 103 U. S. 99; *Smith v. Sheeley*, 12 Wall. 358; *Mutual Life Ins. Co. v. Wilcox*, 8 Biss. 203.

The cases cited by counsel do not justify the conclusion that a party causing by his negligence injury to land, the title to which is held by a corporation, may be relieved from responsibility for damages by showing that the corporation did not legally acquire title to the land, or that it is used for unauthorized purposes. The proposition now presented is substantially negatived by what was said in the *Kelly* case. It was there said: "Had the several grantors made conveyances directly to the company, its title, although it may have been acquired in violation of its charter, could not have been questioned collaterally or otherwise than by the state in some appropriate proceeding for that purpose. The difference between the supposed case and the one now before us shows the inapplicability of the rule announced in *National Bank v. Mathews*, and the authorities there cited."

So, here, if injury is done to real estate conveyed to and held by a corporation, the party by whose negligence such injury is caused cannot be heard to say, in a collateral proceeding, and by way of defence to a suit for damages, that the corporation was not permitted by its charter to acquire title to the property, or that it had acquired it for purposes unauthorized by law. In considering this question the court has not deemed it necessary to determine whether these manufacturing and boom corporations exceeded their authority in acquiring title to cranberry marsh lands valuable only or chiefly for the cultivation of cranberry vines.

It means only to decide that even if they exceeded their authority in the respects named, that fact constitutes no defence to the present claims for damages.

In what I have said the learned district judge concurs.

ESCANABA & LAKE MICHIGAN TRANSP. CO. v. CITY OF CHICAGO.

(Circuit Court, N. D. Illinois. July 7, 1882.)

COMMERCE—DRAW-BRIDGES NOT A NUISANCE—CITY REGULATIONS CONSTITUTIONAL.

A city ordinance regulating the opening and closing of bridges over rivers within the limits of Chicago, so as to permit the alternate passage through of vessels, and the passage over the bridges of teams and persons, and which also provides for the closing of the bridges altogether, against passing vessels, between the hours of 6 and 7 A. M. and 5:30 and 6:30 P. M., is not in conflict with the commerce clause of the constitution of the United States.

Cook & Upton, for complainant.

F. S. Winston, Jr., and *Mr. Ryerson*, for defendant.

HARLAN, Justice, (*orally.*) The complainant is a corporation of the state of Michigan, owning a line of freight propellers, plying between Lake Superior and the docks of the Union Iron & Steel Company, located on the south fork of the south branch of the Chicago river, near Thirty-second street, in the city of Chicago. Under its old charter the city of Chicago had the power "exclusively to erect and construct, or to permit or cause or procure to be erected and constructed, float, pivot, or draw-bridges over the navigable waters within the jurisdiction of said city, and keep the same in repair; said bridges to have draws of suitable width." By the new city charter of 1872 the city is given power "to construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof;" also "to deepen, widen docks, cover, wall, alter, or change the channel of water-courses," and; further, "to make regulations in regard to the use of harbors, towing of vessels, opening and passing the bridges."

By an ordinance of the city it is provided, among other things, as follows:

"Sec. 984. Between the hours of 6 and 7 in the morning, and half past 5 and half past 6 o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago.

"Sec. 985. During the hours between 7 o'clock in the morning and half past 5 o'clock in the evening it shall be unlawful to keep open any bridge within the city of Chicago, for the purpose of permitting vessels or other craft to pass through the same, for a longer period, at any one time, than 10 minutes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal and immediately close the same, and keep it closed for fully 10 minutes, for such persons, teams, or vehicles as may be waiting to pass over. If so much time shall be required when the said bridge shall again be opened, [if necessary for

vessels to pass,] for a like period, and so on alternately, [if necessary,] during the hours last aforesaid; and in every instance when any such bridge shall be opened for the passage of any vessel, vessels, or other craft, and closed before the expiration of 10 minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully 10 minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge.

"Sec. 986. Bridge-tenders, or persons in charge of the bridges, shall not close the same against vessels seeking to pass through until passengers, teams, or vehicles have been delayed fully 10 minutes by the bridges being opened."

The object of the present suit by complainant is to test the validity of the foregoing ordinance. The prayer of complainant is that upon final hearing the court will decree that the bridges, and each and every one thereof, erected across the Chicago river and across the north and south branches, and the south fork of the south branch, when closed and kept closed for the time prescribed by said ordinance, constitute material obstructions to the navigation of said river and the said branches thereof; that each of said bridges so closed and kept closed is a nuisance to the citizens of the states of Illinois and Michigan, as well as other states, and particularly to the complainant; that the ordinances so requiring the closing of said bridges be declared illegal and void; and that the said Harrison-street bridge, and the other bridges south and south-west thereof, across the south branch and the south fork of the south branch, and the piers on which they rest and all material used therein, which obstructs the free navigation of said river, are nuisances to be abated and removed. The complainant also prays that the city may be decreed to open the bridges on the approach of vessels desiring to pass the same, and keep the same open for such time and in such manner as not to obstruct the free navigation of the Chicago river and its said branches.

This case was heard before the district judge and myself upon the pleadings and proof. Justice Harlan announced that the press of business had prevented the preparation of any formal opinion covering the numerous and important questions discussed by counsel. That may hereafter be done. But, as his brother Blodgett and himself had reached a conclusion entirely satisfactory to themselves, and which was not likely to be changed by further consideration of the case, and that parties, if they desire to take the case to a higher court, may not be delayed if such be their purpose, he would now announce that, in their opinion, the ordinance of the city is not in violation of the constitution of the United States or of any act of

congress, and that as there is no cause of action against the city, the bill would be dismissed.

NOTE.—A state may authorize the construction of a draw-bridge across a navigable stream. *Gibbons v. Ogden*, 9 Wheat. 203; *Pennsylvania v. Wheeling, etc., Bridge Co.* 13 How. 607; *Silliman v. Hudson Riv. Bridge Co.* 1 Black, 582; 4 Blatchf. 74, 395; *Albany Bridge Co.* 2 Wall. 403; *Silliman v. T. W. T. B. Co.* 11 Blatchf. 288; *Palmer v. Com'rs of Cuyahoga County*, 3 McLean, 226; *Pennsylvania v. Rensselaer & S. R. Co.* 15 Wend. 113.—[Ed.]

*In re ORNE, Bankrupt.**

(Circuit Court, E. D. Pennsylvania. April 28, 1882.)

LANDLORD AND TENANT—EVICTION—SURRENDER—BANKRUPTCY—DAMAGES FOR BREACH OF COVENANT TO PAY RENT.

A lessee, whose goods were under distraint for rent, made an assignment for the benefit of his creditors. The assignee, while disclaiming any interest in the lease, made an arrangement with the lessor by which the distress was withdrawn, he promising to pay the rent then in arrear, and all rent which should accrue during his occupancy of the premises, and to inform the lessor when he would vacate. About two months afterwards he vacated the premises, sending the key to the lessor, and paying the rent up to that day. The lessor thereupon re-entered and rented the premises to other parties for a less rent. *Held*, that there was neither an eviction of the tenant nor a surrender of the lease, and that the lessor was entitled to prove against the lessee's estate in bankruptcy for damages for the breach of the covenant in the lease to pay the subsequently-accruing rent.

Appeal from the order of the district court allowing proof in bankruptcy of the claim of the trustees under the will of Joshua Francis Fisher against the bankrupt's estate.

The facts on which the claim was founded, as reported by the register, Sussex D. Davis, were as follows:

The bankrupts by a written lease rented the store 626 Chestnut street, Philadelphia, from the trustees of Joshua Francis Fisher, deceased, for two years from January 1, 1876, at a yearly rental of \$8,500. The lease contained, *inter alia*, the following clauses:

"And the lessees for themselves, their legal representatives and assigns, do hereby covenant and agree with the lessors, their legal representatives and assigns, to promptly pay the rent hereby reserved on the day, and times herein specified. * * *

"Provided always, and these presents are on condition, that the lessees shall faithfully perform said covenants, and on breach of any of them it shall be lawful for the lessors to re-enter on the premises as of their former estate.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

And it is further expressly agreed that in case the lessees shall violate any of the covenants herein contained, on their part to be performed, then the lessors shall have the power to terminate this lease, and any attorney in behalf of the lessees may sign an agreement for entering an action of ejectment in any court of competent jurisdiction. * * * No such determination of this lease, or taking or recovering possession of the premises, shall deprive the lessors of any action for rent or for damages for the breach of any covenant herein contained. * * *

On October 23, 1876, the bankrupts made a voluntary assignment, for the benefit of creditors, to Robert Dornan, of the city of Philadelphia, who accepted the duties of his position as such assignee, and proceeded to take possession of the stock in trade (carpets) of the said Orne, at the same time disclaiming any interest in said lease. The assignee found said stock of goods in the store, at No. 626 Chestnut street, under a distress laid by the lessors for rent in arrear, and a constable in possession. An arrangement was then made by him with the lessors, by which it was agreed that the distress should be withdrawn, he promising to pay the rent then in arrear, and all rent which should accrue during his occupancy of the premises. This arrangement was carried out, and on or about December 12, 1876, in accordance with a previous agreement that he should inform the lessors when he would vacate, he sent the keys of the premises to J. Warner Erwin, the agent of the lessors, at the same time paying the rent up to that day, as though it accrued from day to day.

The lessors thereupon rented the premises to other tenants at a lower rental. Subsequently, the lessees having been adjudicated bankrupts, the lessors presented the present claim against the estate, claiming as damages, for the breach of covenant to pay rent, the rent accruing after the assignee vacated, less the sums received from the new tenants. To this claim the assignee in bankruptcy objected, on the grounds that there had been no breach of covenant when the lessors re-entered; that the assignee, not having accepted the lease, could not authorize the lessors to relet; and that the entry of the lessors, and their reletting of the premises to other parties, was an eviction.

The register, after considering the question whether the claim for damages was provable in bankruptcy, and deciding upon the authority of *Ex parte Houghton*, 1 Low. 554, and *Ex Parte Lake*, 2 Low. 544, that it was, overruled the objections and sustained the claim, and his report was sustained by the district court. From the order of the district court the assignee in bankruptcy took this appeal.

R. P. White, for assignee.

George Biddle, for landlord.

McKENNAN, C. J. The argument of appellant's counsel is ingenious and impressive, and if his premises are conceded, his conclusions cannot be gainsaid. If the lease between Orne and Fisher's trustees was surrendered, with intent to terminate it, the trustees could not assert any claim for a subsequent alleged breach of it, for the obvi-

ous reason that a contract, canceled by agreement of the parties, ceases to exist thereafter, and is not susceptible of any breach. And so, if the trustees evicted their tenant, their right to demand and recover rent from him was thereby suspended. But there was neither an eviction of the tenant nor a surrender of the lease. Practically there was an abandonment of the leased premises by the tenant. He was in default for rent accrued, confessedly became insolvent and unable to pay the rent as it might fall due, and transferred his leasehold interest, and the possession of the leased premises, to his assignee. The assignee went into possession, paid the rent in arrear under the constraint of a distress warrant, retained possession for about two months, paying the rent for that period, but declined to accept the lease, and then sent the keys of the premises to the landlord, by whom they were accepted, and to whom one week's notice of an intention to vacate the premises had been given, in pursuance of an understanding to that effect.

Now the fair import of these circumstances is that the tenant did not intend to keep the premises, or to pay the accruing rent, or to observe his covenant, and that he actually vacated and abandoned the premises without the consent of the landlord. Certainly the landlord did not agree to a termination of the lease, and it is clear to me that his acts do not warrant such an implication. In such an emergency he was not bound to stand listlessly by, and thus expose his property to the peril of dilapidation and injury, but in the interest of both parties he might resume possession of it, take proper care of it, and manage it for the benefit of his defaulting tenant. This is what he did do, and he cannot, therefore, be held to have intended to absolve his tenant from the obligation of his covenant, and from liability for damages resulting from his breach of it.

I am therefore of the opinion that proof of damages, measured by the amount of the rent which the tenant covenanted to pay for the remainder of the term, less the sums received by the trustees for intermediate leases to others, was properly allowed, and that this appeal must be dismissed with costs, and it is so ordered.

GINTER v. KINNEY TOBACCO Co. and others.

(Circuit Court, S. D. New York. July 15, 1882.)

1 TRADE MARK—"STRAIGHT CUT."

The term "straight cut," as applied to cigarettes, is a term descriptive of the ingredients and character of the article used, and cannot be appropriated as a trade-mark, so as to preclude another from advertising cigarettes made of straight-cut tobacco.

2. SAME—USE OF TERM TENDING TO DECEIVE.

The use of a term by complainant in a manner calculated to mislead the public in reference to the components or nature of the article to which it is applied, will not be tolerated.

Wm. D. Shipman, for complainant.

Charles B. Meyer, for defendants.

WALLACE, C. J. So far as appears upon this motion the term "straight cut," as applied to cigarettes, is a term descriptive of the ingredients and characteristics of the article, and therefore the complainant cannot appropriate it as a trade-mark and enjoin the defendants from advertising their article as "straight-cut cigarettes."

In the preparation of smoking tobacco several different processes of cutting the leaf are employed, and the product is designated by the term which describes the particular process which it has undergone, such as straight cut, curly cut, long cut, and fine cut. "Straight cut" designates that particular product in which the plant has been so cut and treated at the time of cutting as to preserve the fibers long, even, straight, and parallel when prepared for sale or use. It is stated also that the choicer varieties of the plant are usually selected by this mode of treatment, and the product is especially desirable for cigarettes. In view of these facts it is evident that when the term is applied to cigarettes it implies that they are made of straight-cut tobacco.

The complainant advertises his tobacco as straight cut, curly cut, etc., but always adds some further appellation, such as Twin Pet straight cut, Perfection curly cut, etc. In a circular of May 1, 1881, he states that his "straight-cut tobaccos are cut from the choicest varieties of Virginia gold and sun-cured leaf, and are cut to lie straight in the boxes, and are very desirable for making cigarettes." He now insists that the term was selected and has been employed by his business predecessors and himself as an arbitrary designation of his particular article, and that neither his cigarette nor the defendants' are made of straight-cut tobacco. All this, if true, does not

help the complainant's case, but to the contrary furnishes an additional reason why he should be denied the assistance of a court of equity. Not only has he employed a name to which he could not acquire an exclusive right, but he has used it in a manner calculated to mislead the public, although, perhaps, not intentionally on his part. A purchaser cognizant of the differences in the preparation of smoking tobacco would legitimately infer that the complainant's cigarettes were in fact made of straight-cut tobacco. No principles are better settled in the law of trade-marks than that a generic term, or a name merely descriptive of the ingredients, quality, or characteristics of an article of trade, cannot be the subject of a trade-mark, and that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied will not be tolerated.

The motion for a preliminary injunction is denied.

See *Burton v. Stratton*, ante, 696, and note, 704; *Shaw Stocking Co. v. Mack*, ante, 707, and note 717.

BALLARD and others v. CITY OF PITTSBURGH.

Circuit Court, W. D. Pennsylvania. July 7, 1882.)

1. PATENTS FOR INVENTIONS—ABANDONMENT OF INVENTION.

Where an application for a patent was made and refused, and not till five years thereafter was an amendment of his application filed and an effort to obtain its allowance renewed, the delay is sufficient to raise the inference of an abandonment; but if this inaction is explicable consistently with legal requirement it will not operate to the prejudice of the rights of the inventor.

2. SAME—WEDGE-SHAPED BLOCKS FOR PAVEMENT.

The laying down of a pavement in the defendant's streets, with wedge-shaped transverse channels, made of wedge-shaped blocks, described in patent No. 94,062, and according to the method described in patent No. 94,063, is an infringement of the patent owned by complainants, assignees of the inventor.

3. SAME—INJUNCTION WITHHELD.

Where the interference with the use of wooden pavements constructed in a city, in infringement of complainants' rights, would only operate injuriously on the public, without benefiting complainants, an injunction will not be granted.

In Equity.

C. C. Cole and Chas. F. Blake, for complainants.

Nelson Cross and George Shiras, Jr., for respondent.

McKENNAN, C. J. The bill in this case is founded upon three patents, all of which are alleged to have been infringed by the respondent: (1) Letters patent to Turner Cowing, assignor to Tallmadge E. Brown, No. 101,590, dated April 5, 1870, for "improvement in wood pavement." (2) Letters patent to William W. Ballard and Buren B. Waddell, (who assigned his right to Ballard,) No. 94,062, dated August 24, 1869, for "improved wood pavement." (3) Letters patent to the same persons last named, (Waddell having assigned his interest in the invention to Ballard,) No. 94,063, dated August 24, 1869, for "improved mode of cutting blocks for wood pavement." The first two patents are, then, for wooden pavement as a structure, and the last for the method of preparing blocks to be used in such structure.

The cardinal feature of the pavement described and claimed in the first patent consists in wooden blocks, with inclined sides, so laid on their larger ends as to form wedge-shaped crevices or grooves for the reception of concrete or other suitable filling. Although this patent is dated April 5, 1870, the original application for it was made November 13, 1865, and it is therefore prior to all other patents, to which my attention has been called, for the form of wood pavement described in it. Whatever mutations this application may have undergone after it was filed in the patent-office, the wedge-shaped crevices, and the necessarily sloping sides of the blocks, were a distinguishing feature of it, and I think, therefore, the patent finally granted was properly engrafted upon it as its parent stock.

It is urged, however, that Cowing's application was abandoned, and that his patent cannot relate back to the date of the filing of the application. On the twenty-seventh day of December, 1865, a patent was refused him, and the case remained in this condition until May 5, 1869, when an amendment of his application was filed, and the effort to obtain its allowance renewed. This interval of inaction is certainly sufficient to justify an inference of abandonment, because of the apparent default of the applicant in the prosecution of his application with due diligence, as the law requires. But, as has been repeatedly held, if this inaction is explicable consistently with this legal requirement, it will not operate to the prejudice of his right as a meritorious inventor. It was thus explained by the proofs laid before the commissioner of patents, in which it appeared that the applicant had been "generally incapacitated for business by mental disorder." Thereupon the case was reconsidered by the commis-

sioner,—himself one of the most eminent patent lawyers of his time,—and the patent granted, as I think, rightfully.

During this interval, however, to-wit, on the thirty-first of March, 1868, letters patent No. 76,227 were granted to Miller & Mason for an improved wood pavement. These patentees disclaimed the "invention of the wedge-shaped blocks," but claimed as their invention a combination consisting of wedge-shaped blocks, when so laid as to break joints with those of the opposite rows, concrete filling, and a continuous wood foundation. But the wedge-shape channels between the rows of blocks, caused by the use of blocks with inclining sides, was the invention of Cowing, whose application for a patent was then pending in the patent-office. The pendency and allowance of this application subordinated Miller & Mason's patent to Cowing's, and precluded the use by them of the wedge-shaped channel in their combination without his consent. This was the state of the art when the two remaining patents set up in the bill were applied for and granted. The first of these, No. 94,063, is for a method of cutting blocks for wooden pavement so as to form by two cuts, or one cut and one splitting, two finished blocks, with the top and bottom level, or in parallel planes, and the sides bevelled, one side being inclined with the fiber, and without waste of material. The other, No. 94,062, is for the blocks produced by this method, as an article of manufacture, and also for a wooden pavement constructed with them.

It is very earnestly urged that this method of producing fabrics of wood is not novel, and that it is indicated in the patent of Miller & Mason. I do not propose to follow this discussion in detail. It is sufficient for me to say that the proofs fail to show that a block of wood adapted to pavement construction, or any analogous fabric, suggestive of such use, with the top and bottom in parallel planes, and the sides bevelled, one side being inclined with the fiber, had been made, or that two such blocks could be formed out of a piece of timber of suitable dimensions by two cuts, or one cut and one splitting, without waste of material, before the date of the patents in question. Nor does the patent of Miller & Mason even indefinitely describe the Ballard block, or indicate any method of making it. All that is said is that the blocks are to be bevelled on both sides from top to bottom, and "to be cut from plank, and are of the usual size, having the fiber *vertical*," or that they "can be cut with less waste of material by cutting them from timber, and splitting the timber blocks with the

proper bevel." But this does not describe a wedge-shaped block having the grain running *parallel* to one and *oblique* to the other of its bevelled sides, nor how two of such blocks may be produced at the same operation without waste of material by two cuts of a saw.

All of these three patents the respondent is shown to have infringed, in causing to be laid upon two of its streets, viz., Lincoln and Fifth avenues, wooden pavements with wedge-shaped, transverse channels made of wedge-shaped blocks, described in patent No. 94,062, and according to the method described in patent No. 94,063. In describing the mode in which the blocks used in these pavements were made, Mr. Diester, in his deposition, sufficiently identifies them with the patented block and process, but the exhibits produced by him are demonstrative.

I am, therefore, of opinion (1) that the patent of Turner Cowing, assignor to Brown, is valid, and covers the use of the wedge-shaped channel or crevice, therein described, in wooden-pavement construction; (2) that the patents to Ballard and Waddell, Nos. 94,062 and 94,063, are also valid, and that they secure to said patentees the exclusive right to make and use, in wooden pavements, the blocks therein described; (3) that the wedge-shaped channel is embodied in the pavements aforesaid, constructed for the city of Pittsburgh, and that wedge-shaped blocks, formed and made substantially as described and directed in Nos. 94,062-63, were used in the construction of said pavements; (4) that there ought to be a decree for the complainants.

Inasmuch as any interference with the use of the wooden pavements constructed in the city of Pittsburgh, in infringement of the complainant's rights, would only operate injuriously upon the public, without benefiting the complainants, an injunction will not be granted. But there must be a reference to a master to ascertain profits and damages, and a decree will accordingly be entered.

HAYWARD and others v. ANDREWS and others.

(Circuit Court, N. D. Illinois. July 7, 1882.)

PATENTS FOR INVENTIONS—REMEDY AT LAW.

Where the assignee of damages for an infringement of a patent for an invention has an adequate remedy at law for an infringement of the patent, which expired before the assignment was made, a demurrer to the bill will be sustained without prejudice to a suit at law for damages.

G. M. Spier and Banning & Banning, for complainant.
West & Bond, for defendant.

HARLAN, Justice, (*orally.*) On the eighteenth of September, 1869, Aaron H. Allen, of Boston, executed a writing declaring that he had granted to Schemerhorn & Co. the sole right and privilege of manufacturing and selling school furniture made according to letters patent for a tilting seat, supported on the lever principle, granted to Allen on the fifth of December, 1854, reissued on the sixteenth of January, 1861, and extended seven years from December 5, 1868. On March 8, 1880, the patentee executed to Hayward, the complainant, a written assignment of all the former's interest in a certain decree in the circuit court of the United States for the southern district of New York, "together with all claims for damages arising since the eighteenth day of September, 1869, against any persons, firms, or corporations by reason of infringements of letters patent of the United States for a tilting seat," etc. And by that assignment Allen made, constituted, and appointed Hayward his attorney irrevocable, "for him and in his name," but for the use and benefit of Hayward, and under certain named conditions, to ask, demand, and by all lawful ways and means to recover and receive, all money due and to become due in a suit pending in New York, and to "collect the claims for damages herein before assigned, and on payment or collection of the same to acknowledge satisfaction, or give other good and sufficient releases and discharges of the said judgments and claims." The assignment was recorded in the patent-office on May 25, 1881. On the twelfth of May, 1881, Platt, assignee in bankruptcy of Schemerhorn & Co., executed a written assignment, purporting to be made in pursuance of the order of the bankruptcy court, transferring and conveying, for the consideration of \$900, to Hayward, all of his right, title, and interest, as such assignee, in and to the letters patent granted to Allen, and the reissue and extension thereof, together with all claim, demand, and action and causes of action arising to the assignee. This assignment, being acknowledged, was recorded in the patent-office on May 25, 1881. The present suit in equity was commenced December 1, 1881, in the name of Hayward and Allen against A. H. Andrews & Co., to recover the gains and profits realized by defendants from an alleged unlawful making, using, and selling seats embracing the patented improvement, and the damages sustained thereby. Subsequently, on May 25, 1882, the bill was dismissed by complainants as to Allen, and on the same day Hayward filed an amended bill, to which was appended copies of the foregoing written assignments.

The case was submitted to the court upon a demurrer by defendants, the chief ground of which is that Hayward, as assignee of a claim for profits and damages, becoming such after the expiration of the extended patent, could not maintain a suit in equity to recover such profits and damages. *Held*: (1) The case of *Root v. Lake Shore & M. S. R. Co.*, determined in the supreme court of the United States at its last term, [11 FED. REP. 349, note,] establishes the proposition that Allen, had he never made an assignment of his claim for damages, could not himself have invoked the jurisdiction of a court of equity. (2) The contention of complainant's counsel is that Hayward, as assignee, acquired only an equitable title in Allen's claim for infringement, and therefore could sue in equity. Waiving any determination of the general question in the form it is now presented, it is sufficient in this case to say that Hayward has a complete and adequate remedy at law. So far as the present claim for damages against defendants rests upon the assignment by Allen to Schemerhorn & Co., and the assignment by their assignee in bankruptcy to Hayward, the latter can sue in his own name at law; and so far as his cause for action rests upon Allen's assignment to him, he can sue in Allen's name, since the writing executed by Allen gives him authority to do so. There is therefore no impediment which will prevent Hayward from resorting to remedies purely legal.

The demurrer is sustained, and the bill is dismissed without prejudice to a suit at law by Hayward.

ODORLESS EXCAVATING CO. v. LAUMAN.*

(Circuit Court, E. D. Louisiana. May, 1882.)

PATENTS—INJUNCTION.

Where the validity of a patent has been affirmed by a decree of a federal court it will be taken as conceded, and, upon an application for an injunction, the only question will be as to the infringement.

BILLINGS, D. J. This case is submitted on an application for an injunction to prevent infringement. Complainant is the owner by assignment of two patents—the Strauss patent, issued to Louis Strauss, January 28, 1868; and the Painter patent, issued to William Painter on the fifth day of August, 1873. The Strauss patent was for “an

*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

improvement in apparatus for cleaning privies," and consists in the combination of a reservoir or receiving tank, a deodorizer whereby the fetid air is passed over burning charcoal or a gas-burning stove, and a forcing pump, together with an apparatus for emptying privy vaults. The invention set forth in the Painter patent is for "an improvement in pump valves," to be used in "combination with a flap valve, the stiffeners or braces being arranged to prevent collapsing." Complainant shows that the validity of these two patents under which it claims has been confirmed by a decree of the United States circuit court for the fourth circuit and district of Maryland, in the case of this complainant and Burton A. McCauley. The only question, therefore, is that as to infringement. The evidence upon the point of infringement is a description of defendant's method by August Guerin and the opinion of Joseph Jouet. This testimony is very explicit, and, if the facts stated by Guerin and the opinions and deductions of Jouet are correct, show an infringement of both patents. To meet this evidence the defendant introduced the affidavits of Michael Kern and Peter Frisht, which substantially deny any infringement. The affidavit is a joint one, and is largely in the nature of an opinion, and while its language shows scientific discrimination, it is not stated or shown that the affiants are experts.

I think, therefore, the injunction should issue, with leave to the defendant to move to dissolve upon his filing his answer upon fuller showing, if he shall so be advised. Let the injunction issue.

FORD v. KURTZ and others.

(Circuit Court, N. D. Illinois. July 7, 1882.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES.

Where the infringement was neither wilful nor malicious, only the net profits realized from the manufacture and sale of the patented articles will be allowed.

2. COSTS.

Where the defendants were willing, at the outset, and offered to pay the amount of net profits realized by them, and costs have been unnecessarily accumulated, the parties should pay their own costs, and each party pay half the master's fee.

Mr. Bellows, for complainant.

Mr. Sherburne, for defendants.

HARLAN, Justice, (*orally*.) The findings of the master in this case are correct. The infringement by defendants of complainant's patent was neither wilful nor malicious. The case does not justify a decree against them beyond the net profits realized from the manufacture and sale of the patented articles. That sum is found to be \$28.06. For that sum the complainant may have a decree.

In reference to the costs the conclusion is justified by the record that the defendants were willing at the outset, and through their attorney offered, to pay to the complainant the amount of the net profits realized by them, but the complainant was desirous of mulcting them in damages, under circumstances not calling for such a course. Costs have been unnecessarily accumulated, and I think it just that the parties be required to pay their own costs, and each party must pay one-half of the master's fee, as it may hereafter be fixed by the circuit judge.

WALLICKS *v.* CANTRELL and others.*

(Circuit Court, E. D. Pennsylvania. May 3, 1882.)

PATENT—APPARATUS FOR ENAMELLING MOULDINGS.

Letters patent No. 163,825 for an improvement in apparatus for enamelling mouldings sustained.

Bill for an Injunction to Restrain the Infringement of a Patent.

Charles Howson, for complainant.

J. W. Shortlidge, for defendants.

BUTLER, D. J. A very few lines will explain our views of this case. Letters patent No. 163,825, for an "improvement in apparatus for enamelling mouldings" were issued to the plaintiff May 25, 1875, containing a single claim, as follows: "An enamelling-box divided into two compartments by a slotted partition, and having openings at the end, in a line with the slot in the partition, all substantially as, and for, the purpose set forth." The bill charges infringement of this patent. The defences set up, and urged at the hearing, were *first*, that the patent is invalid, and, *second*, that the defendants have not infringed. The first was based principally on an allegation of prior use. As respects this it is sufficient to say that in our judgment, the allegation is not sustained. A written review of the testimony would be of no value.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

A careful examination has satisfied us that its weight is against the defendants, while the burden of proof is on them.

The suggested objection to the claim, is unfounded. The claim embraces nothing that should not have been included. It covers simply the peculiar enamelling-box invented and constructed by the plaintiff, and shown by the model.

That the defendants' device infringes the plaintiff's we cannot doubt. It was designed for the same purpose, and accomplishes it in the same way, and substantially by the same means. The mechanical appliances are virtually undistinguishable, and the mode of operation and result are identical. Without the expert testimony,—which is very positive,—this conclusion is fully sustained by inspection of the two boxes and their work.

A decree must be entered accordingly,

THE PIERREPONT.*

THE MARY MORGAN.*

(*District Court, E. D. Pennsylvania. March 31, 1882.*)

ADMIRALTY—COLLISION—MUTUAL FAULT.

A steam-barge and a steam-boat collided on the Delaware river. The testimony as to the circumstances under which the collision occurred was in direct and irreconcilable conflict. It appeared, however, that the lamps of the barge were partially obscured by smoke, and that she did not signal until too late to prevent a collision, and that on the other hand the steam-boat had seen only the white light of the barge, and supposing it to belong to a vessel at anchor, had steered accordingly, until the signal of the barge was heard. *Held*, that the barge was negligent in not having her lights in proper condition, and in not signaling in time; that the steam-boat was also negligent in not discovering earlier that the barge was in motion; and that the damages should, therefore, be equally divided.

Cross-libels—one by the owners of the steam-barge Pierrepont against the steam-boat Mary Morgan, and the other by the owners of the Morgan against the Pierrepont—to recover damages caused by a collision. The evidence was as follows: On August 8, 1879, at about 10 o'clock p. m., the Pierrepont, bound up the Delaware river, collided with the Morgan, which was coming down. The night was cloudy, but not stormy. The testimony, as to the circumstances

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

under which the collision occurred, was in direct and irreconcilable conflict. On behalf of the libellants it was testified that the *Pierrepoint* was on the eastern side of the channel; that the red light of the *Morgan* was first discovered about one point off the port bow; that the *Pierrepoint* held her course, but that when about half a mile distant the *Morgan* changed her course, showing both her side lights; that when within hailing distance the *Pierrepoint* blew one whistle, which was answered by the *Mary Morgan*, with one whistle; that the *Pierrepoint's* wheel was then ported; that the *Morgan* again changed her course, showing only her red light, but almost immediately thereafter changed her course again and showed her green light, and then almost immediately shut out her green light and opened her red; that the *Morgan* was then about 100 yards distant, and at least two points off the *Pierrepoint's* port bow, with no danger of collision, when suddenly, without any necessity, she again changed her course by starboarding her wheel, and ran into the *Pierrepoint*, striking her on the port bow. On behalf of the respondents it was testified that the *Morgan* was running in mid-channel on the course of the Hamburg range lights; that the white light of the *Pierrepoint* was seen on the starboard bow of the *Morgan*, and was believed to be the light of a vessel at anchor; that while steering to pass, keeping that light on the right, a whistle from the *Pierrepoint* showed it to be a steamer in motion; that the signal was immediately responded to by the *Morgan*, the helm of the latter thrown hard a-port, and her engines reversed, but that the vessels came together immediately, the *Morgan* striking the port side of the *Pierrepoint*. It appeared that the bell-wire of the *Pierrepoint* had been broken prior to the collision, and hence her pilot was unable to signal to the engineer to reverse her engine. With regard to the condition of the *Pierrepoint's* lights the testimony was also in direct conflict, the libellant's witnesses testifying that the lights were properly burning, and respondent's witnesses testifying that she had no side lights burning at the time of the collision. There was some evidence that the *Pierrepoint's* lamps were encrusted with smoke, and that her awnings were torn, and might possibly have obscured her lights by flapping.

Alfred Driver and J. Warren Coulston, for the Pierrepoint.

Henry G. Ward and Morton P. Henry, for the Mary Morgan.

BUTLER, D. J. These cases exhibit a large amount of conflicting evidence,—much of it being irreconcilable. A careful examination however has satisfied me that both vessels were in fault. The course of each was near the center of the channel, and they were conse-

quently approaching, virtually, "head on." What the several witnesses say respecting the position of range lights, and the situation of the vessels, before danger was apprehended, is not entitled to much weight. There was nothing to call attention to the subject, or calculated to impress the mind respecting it. The probability is that each vessel was steering by the lights, on a course near the center of the channel; and this is strengthened by the circumstances of the case.

The fault of the Morgan consisted in failing to discover that the Pierrepont was in motion, until close upon her. She had seen the latter's mast-head light at a considerable distance, and discovering no other, supposed her to be at anchor. Resting too confidently upon this, she failed in the observance of proper care to ascertain its correctness. Such care would have discovered other lights, and revealed the fact that she was in motion. It is quite probable that these lights could not be seen when the mast light first came into view,—either on account of their situation, or their imperfect condition. That they were in imperfect condition, I have no doubt. Proper vigilance, however, would have discovered them; for it is reasonable to believe that they could have been seen at a considerable distance, notwithstanding the partial smoking of the glass. The officers and lookout appear to have been careless. When the conclusion was reached, on discovering the mast-head light, that the Morgan was stationary, it was resolved to pass to the eastward, and no pains whatever were taken, as they approached, to ascertain whether the conclusion was correct or not.

The fault of the Pierrepont consisted—*First*, in failing to have her side lights in proper condition. I cannot doubt that they were burning; but I think it reasonably certain they were obscured by smoke. *Second*, in failing to signal the Morgan as early as should have been done. She saw this vessel when distant; and while she was coming almost, if not quite, directly in front, no signal was given until she had approached so near that collision was probably inevitable. I am satisfied the signal was immediately obeyed by porting the Morgan's helm, and reversing the engine. Nothing more was possible, and yet the vessels came together before the Morgan's head could be turned.

The testimony of the Pierrepont, that the Morgan was at a safe distance when signaled, and changed her course several times *afterwards*, turning to the east immediately before the collision, and thus causing it, is not only in conflict with the testimony of the Morgan, but is so

opposed to all reasonable inferences as to be incredible. Aware of the danger, and porting her wheel to avoid it, why would she change her course at the critical moment, and thus imperil herself as well as the *Pierrepoint*? Whether the collision might still have been avoided at the time of signaling, if the *Pierrepoint* had reversed her engine as the *Morgan* did, is open to doubt. The experiment should have been tried. The condition of her bell-wire, however, rendered this impracticable. Whether fault should be attributed to her on this account need not be considered.

The foregoing is a statement of conclusions merely; and I shall attempt nothing more. An analysis of the mass of conflicting testimony would be of little value, while its preparation would require more time than I have to spare.

A decree for half damages will be entered.

See *The Leversons*, 10 FED. REP. 753.

THE RALPH M. HAYWARD.*

(*District Court, E. D. Pennsylvania. April 21, 1882.*)

ADMIRALTY—COLLISION—CONFLICT OF TESTIMONY—MUTUAL FAULT.

Two vessels collided on a dark and stormy night. The testimony as to the cause of collision was in direct and irreconcilable conflict. It appeared, however, that there was a want of vigilance on both sides, and that although the libellant was primarily responsible, the respondent having the right of way, yet the respondent had executed a wrong maneuver, which probably contributed to cause the collision, and also proceeded on her course without stopping to ascertain the extent of libellant's injury. *Held*, that the damages should be equally divided.

Libel by the owners of the schooner Joseph H. Huddell, Jr., against the barkentine Ralph M. Hayward, to recover damages for a collision.

The collision occurred in the Atlantic ocean, opposite Absecom light, on the New Jersey coast, about midnight, on November 19, 1881. The night was dark and stormy, the wind blowing a gale. The exact direction of the wind was in dispute, libellants alleging that it was north-west, and respondents that it was west-north-west. The schooner was bound up the coast on a voyage from Philadelphia to Boston with a cargo of coal. The barkentine was bound down

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the coast in ballast. The testimony as to the cause of the collision was in direct conflict.

On behalf of the libellants it was testified that the schooner was sailing a course of about N. E. by N., and first discovered the barkentine's green light about two points off the starboard bow, and from half a mile to a mile distant; that the schooner's helm was put to starboard until the green light was three or four points off the starboard bow; that the barkentine then attempted to luff across the bow of the schooner, showing both her lights, and immediately thereafter striking the schooner on her starboard quarter.

On behalf of the respondent it was testified that the barkentine was sailing a course of about south-west, or a little to the southward of that point, close-hauled, and on the starboard tack; that the green light of the schooner was seen about a point and a half on the port bow, at a distance of about two miles; that the barkentine, having the right of way, held her luff, and that when the vessels were close together the schooner attempted to cross the barkentine's bows from port to starboard; that in the moment of peril, and in order to avert the impending disaster the barkentine's helm was hove up with the hope of passing under the schooner's stern, but that it was too late to avoid the collision. It appeared that up to the time of striking the barkentine all hands on board the schooner had been engaged in shortening sail, and that no lookout was stationed until shortly before the collision. It also appeared that, although it was the master's watch on board the barkentine, he had gone below, leaving the deck in charge of the second mate; that just prior to the collision the lookout on the barkentine sang out to the man at the wheel to "hard up," but that the second mate countermanded this order and ordered the man at the wheel to luff, which was done. It further appeared that the schooner sank in consequence of the collision, and that the barkentine proceeded on her course without rescuing the crew, who were subsequently taken off by a passing steamer. In excuse of this it was testified by those on board the barkentine that they did not know the schooner had been seriously damaged by the collision.

Alfred Driver and J. Warren Coulston, for libellant.

Theodore M. Etting and Henry R. Edmunds, for respondent.

BUTLER, D. J. Libellant has the burden of proof. The testimony is in direct, irreconcilable conflict. If libellant's is true she was free from fault, and her antagonist wholly blamable; if respondent's is believed she was blameless, and the libellant alone in fault. It is quite clear respondent had the right of way. She

was close-hauled, and on her starboard tack. It was therefore libellant's duty to keep out off and hers to hold her course.

The case having been heard during juryperiod of the circuit court, and an early decision being required by the peculiar circumstances, I have time to do no more than indicate the grounds on which the decree rests.

While it may be irreconcilable with libellant's testimony, the conclusion is reasonable, from all the evidence, that the parties when first aware of each other's presence, were meeting very nearly head on. The lookout of libellant was deficient, (while the character of the night and weather demanded unusual vigilance,) and respondent consequently was not seen, I believe, until the vessels were near together. It seems quite probable, and I believe it to be a fact, that when the libellant ported her helm and changed her course she was brought across the respondent's bows, in dangerous proximity. She was in fault, therefore, in failing to discover the respondent as early as she should have done, and in failing to keep off. What her witnesses say respecting lights, distances, and positions of the respective vessels, and the theory upon which her case is rested by counsel, cannot be accepted. They are not only inconsistent with probabilities, but, as the assessors report, are actually disproved by the collision itself. As these gentlemen say, no collision could have taken place if the facts were as here stated; it was a nautical impossibility.

I find, however, that respondent also was in fault. Notwithstanding the character of the night and weather, her officers' conduct shows great want of vigilance. Three men alone were on deck at the time; the captain and mate both being below. When the light was seen the captain was not called, and the second mate, who was on deck, appears, from his acts to have been reckless or incompetent. While the lookout, who saw what was necessary to be done, gave the proper order to the man at the wheel, the mate countermanded it, and brought the vessel further up into the wind—the direct tendency of which was to render the collision inevitable. It is improbable the vessel made material headway in this new direction, but the change of course necessarily tended to the result which followed. I do not think it can properly be said that the vessel was actually in peril when this change was made. It is quite clear that if the order given by the lookout had been obeyed, the collision would have been avoided. It is true the libellant should not have made any change in the respondent's course neces-

sary, but in view of the night and weather, and other attendant circumstances, it certainly was the respondent's duty to execute the maneuver ordered by the lookout. Furthermore, it cannot be known that the libellant would not have escaped, notwithstanding her fault, if the respondent had not made the blunder—her conduct in going off without ascertaining the extent of injury inflicted was also inexcusable. The circumstances were such as to justify serious apprehension for the libellant's safety. It was her duty, therefore, to ascertain the extent of the injury, and the necessity for help, or the absence of it, before pursuing her course.

In view of the facts the libellant should have a decree for half damages.

The court propounded certain questions to two nautical experts, called as assessors, which, with the answers thereto, were as follows:

1. Suppose the courses and positions of the respective vessels to have been such as the libellant states, and as his counsel illustrated on the blackboard in your presence, could the collision have occurred?

If you answer that it could not, give your reasons fully for this conclusion.

Answer. That we have no hesitation in saying the collision, under the circumstances as stated by the libellant, could not have occurred, for the reasons that the schooner steering N. E. by N., making a green light two points on her starboard bow, shows that she has passed the line on which that vessel was steering, and also shows that that vessel must be steering to the southward of S. W. by W., for if steering up this high both lights would be seen, and if any higher the red alone; therefore the schooner had passed the line of all danger, and her course was constantly increasing the distance. When the schooner hauled up N. by E., bringing the green light four points on the lee bow, she would be increasing the distance more rapidly.

The wind, as stated, being N. W., the bark could head W. S. W. if the wind and sea were moderate; but being stormy—blowing a gale—and she being under short canvas and light, she would vary and fall off a point to leeward, and would make one if not two points leeway, which would give her a course of S. W. to S. W. by S. through the water.

2. May the difference in the direction of the wind stated by the parties be reconciled by the fact that the vessels were running in opposite directions; in other words, if the libellant found the wind as she states, would the respondent probably find it as she describes?

Answer. The apparent difference in the direction of the wind between N. W. and W. N. W. is only two points, and to two vessels steering in opposite directions their velocity would make the wind appear more ahead, especially when blowing heavily, and would account for that difference.

3. Was there any excuse for the order given by the bark's mate turning the vessel further up into the wind? How do you explain the mate's conduct in this respect?

Answer. The bark being by the wind on the starboard tack, having the right of way, we see no excuse for putting the helm down, as it would tend to shoot her up to windward and across the schooner's track. If she had kept her course the probability is she would have gone clear, for by her luffing in the wind she barely managed to hit the schooner.

After her luffing, when she would lose her way, it would take some time for her to get sufficient headway for the helm to act to keep her off.

The action of the mate we cannot understand; as, when the light was seen and likely to come near, it was certainly his duty to have called the captain, and let him do what maneuvering he thought necessary. His action seems to have been without any thought or even ordinary judgment.

THE ATLAS.*

(*District Court, E. D. Pennsylvania. May 19, 1882.*)

ADMIRALTY—LIABILITY OF TUG FOR GROUNDING OF TOW.

It is the duty of the captain of the tug, when he sees his tow steering directly into danger, to warn her against it.

Libel by the owner of the bark *Lena* against the tug *Atlas* to recover damages caused by the grounding of the bark while in tow of the tug. It appeared that on November 1, 1881, the tug took the bark in tow on the Schuylkill river and proceeded down the river. In making a turn near the mouth of the river the bark grounded. Libellant alleged that this was caused by the negligence of the tug in running too near the shore. Respondents claimed that it was caused by the failure of the bark to keep in the wake of the tug.

J. Q. Lane, for libellant.

Theodore M. Etting and *Henry R. Edmunds*, for respondents.

BUTLER, D. J. The respondent was blamable in running too near the Pennsylvania shore. The bark kept in her wake until she found herself running aground, or in imminent danger of it, when she sheered off towards deeper water; but was brought up in the mud before reaching it. The testimony of Captain Keller, of the *Atlas*, that the *Lena* ported her helm, running to starboard of his course, making a shorter turn than the tug, and thus approaching nearer the Pennsylvania shore, is contradicted by all the witnesses on board the *Lena*, and unsupported by any evidence in the cause. If it were true, it is susceptible of being proved beyond doubt. It furthermore seems incredible that the captain of the tug should have seen his tow thus

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

steering directly into danger, and should not have warned her against it, although, as he says, she ran on this course 300 feet before grounding. It is unnecessary to enlarge upon the subject. The captain of the *Atlas* was in fault; and his attempt to excuse himself is unavailing. His reason for keeping towards the shore was, doubtless, the one assigned in his conversation with the *Lena's* crew, immediately after the accident—that he expected the wind, which was from the north-east, and the ebb-tide, to drive him towards the other side. The libel is therefore sustained, with costs.

Contract—Effect of Abrogation.

WARNER v. STODDART, U. S. Sup. Ct. Oct. Term, 1882. Error to the circuit court of the United States for the northern district of Illinois. A contract was entered into between a book publisher and a book agent, wherein the agent agreed to canvass for the sale of a certain reprinted work, and the publishers agreed to furnish the work to the agent for the subscribers on certain terms—the remittances to be made, one-half on the seventh and one-half on the twenty-sixth day of the month, in settlement for the previous month's sales. After procuring a number of subscriptions the agent entered into a contract with a rival publishing house to canvass for and sell their edition of a report of the same work, and ceased to canvass for the work under the first contract, but ordered books to be supplied by them under the terms of the contract, which they refused, demanding cash on delivery for the books thereafter supplied to him, and brought suit against him for the value of the books already supplied. The agent, as defendant in that suit, as a set-off, made a claim for damages for loss in not being supplied with the books under the terms of the contract, and from substituting the works of the rival firm in consequence. The case was determined in the supreme court of the United States on April 24, 1882. Mr. Justice *Woods* delivered the opinion of the court, affirming the judgment of the circuit court denying the claim for damages.

Plaintiff in error had no right, upon a refusal of defendant in error to furnish the books on 30 days' credit, to obtain a cancellation of the orders he had taken and substitute therefor orders for the rival edition, and charge the expense of the substitution to defendant in error. The clauses of such a contract are reciprocal, and the performance of one was the consideration for the performance of the other; and when he ceased to canvass for the books he had no right to demand them at the prices or the terms mentioned in the contract. Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do so, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. If the defendant in error violated his contract by refusing to

fill orders except for cash, the measure of damages would be the interest for 30 days on the amount of cash paid on his orders; and where no cash had ever been paid, he would be in any view entitled only to nominal damages. Defendant in error was not bound by the contract after plaintiff in error had refused to go on under his contract.

Van H. Higgins and Isaac N. Arnold, for plaintiff in error.

Josiah R. Sypher, for defendant in error.

The cases cited in the opinion were: *Wecker v. Hoppack*, 6 Wall. 94; *Miller v. Mariners' Church*, 7 Greenl. 56; *Russell v. Butterfield*, 21 Wend. 304; *Ketchell v. Burns*, 24 Wend. 457; *U. S. v. Burnham*, 1 Mason, 57; *Taylor v. Read*, 4 Paige, 571.

Wharfage—City Ordinance.

CINCINNATI, B. B. S. & P. PKT. CO. v. BOARD OF TRUSTEES OF CATLETTSBURGH, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the district of Kentucky. The case was determined in the supreme court of the United States on May 8, 1882. Mr. Justice *Miller* delivered the opinion of the court, affirming the decree of the circuit court dismissing the bill.

A town ordinance establishing charges upon steam-boats and other water craft landing at the public landings within the town, and appointing and establishing certain points at which such landings shall be made, and grading the rates for landing according to their tonnage, and affixing a penalty for violation of the ordinance, is not a tax on tonnage, within the meaning of the constitution of the United States, and if a regulation of commerce it is of that class for which states may prescribe rules in the absence of congressional legislation on the subject; and such an ordinance is not repugnant to the constitution of the United States. The money collected for wharfage under a town ordinance is not taxes, and its collection will not be restrained unless it is shown that the rates are excessive, and that there was a clear abuse of the power properly conferred on the trustees in regard to the wharfage charges, such as would justify the interposition of a court of equity

David Stuart Hounsell, for plaintiff.

Cases cited in the opinion: *Wharfage not a tax on tonnage*, *Cannon v. New Orleans*, 20 Wall. 577; *Packet Co. v. St. Louis*, 100 U. S. 428; *Packet Co. v. Keokuk*, 95 U. S. 80; *Guy v. Baltimore*, 100 U. S. 434; nor regulation of commerce, *Cooley v. Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Ware, 713; *Crandall v. Nevada*, 6 Wall. 35; *Pound v. Truck*, 95 U. S. 462.

PRICE v. FOREMAN and others.

(Circuit Court, S. D. Illinois. July 7, 1882.)

REMOVAL OF SUIT FROM STATE COURT.

Federal courts are without jurisdiction where a necessary party defendant is a citizen of the same state with complainant, between whom and the other defendant, a citizen of another state, there is no separable controversy.

G. Koerner, for complainant.

Geo. B. Strong, for American Bible Society and Missionary Society of M. E. Church.

HARLAN, Justice, (*orally*.) This presents a question of removal under the acts of congress regulating the jurisdiction of the circuit courts of the United States.

Isaac Foreman died in St. Clair county, in this state, having made his last will and testament, which was duly probated, and by which, in its first clause, was devised to his wife, Rebecca Foreman, certain personal property absolutely, and also the homestead for life. By the second clause, the defendants Thomas, Peiper, and Harrison were appointed executors and trustees for the purposes thereafter named. By the third clause the executors are directed and empowered to sell and convey the whole of the testator's real and personal estate not thereinbefore disposed of, and convert the same into money. The fourth clause, after providing for the payment of the testator's just debts, gives and bequeaths to the executors the sum of \$2,000, *in trust* for the use and benefit of his daughter, Mary Price, during her natural life, to be safely loaned or invested, the interest or profits annually to be paid to her during her natural life; and after her death, the interest or proceeds to be paid annually for the maintenance and education of her child or children, and such principal sum to be paid to her child or children when he, she, or they become of age. Should the daughter die, leaving no child or children, or should all of them die before arriving at full age, then the said sum of \$2,000 is made payable, two-thirds thereof to the American Bible Society, and the remaining one-third to the Missionary Society of the Methodist Episcopal Church of the United States of America. The last clause gave and bequeathed the proceeds in money of all the real and personal estate not thereinbefore specifically devised, as follows: Two-thirds to the Bible Society and the remaining third to the Missionary Society. After the death of

the wife the executors were authorized and empowered to sell and convey the real estate devised to her, the proceeds to be divided between the before-mentioned corporations in the proportions above indicated.

The present suit was instituted by Mary Price, the daughter and only child and heir at law of decedent, for the purpose of obtaining a decree declaring the will not to be his true last will. The sole ground upon which it is impeached is that the deceased was mentally incapable of making a will.

The complainant is, and was at the commencement of the action, a citizen of Illinois, as are and were the defendants Rebecca Foreman (the widow) and the three executors, Thomas, Peiper, and Harrison. The Bible Society and the Missionary Society, also defendants, are corporations of the state of New York. The case was removed from the state court and docketed here upon the petition of the two New York corporations, and a motion has been made to remand the cause to the state court for want of jurisdiction in this court.

Held: 1. The widow having renounced the provisions of the will and taken what the statute allows she can have no interest in the result of the suit. She cannot be affected by its determination, because what she has received can neither be increased nor diminished, however this suit may result. She is therefore to be deemed a nominal party only.

2. It is said that the executors are only clothed by the will with power of sale, and have no such beneficial interest in the present controversy as makes it necessary, within the meaning of the adjudged cases, to inquire as to their citizenship. Passing by this suggestion, so far as it relates to the authority conferred upon the executor to sell the real and personal estate of the testator, and to pay over the proceeds of such sale to the corporations named in the will, it is clear that they hold different relations to the money (\$2,000) bequeathed to them in trust for the use and benefit of Mary Price during her life. The issue made by the complainant necessarily embraces the entire suit, and all the defendants except the widow. The defendant executors and trustees, and the foreign corporations, are all indispensable parties. The issue made is, will or no will. As trustees for Mary Price (if not as executors charged with certain duties and invested with authority to sell and convey certain property) the defendants Thomas, Peiper, and Harrison have a direct legal interest in opposition to complainant's claim that the testator was

incompetent to make a will. There is, it is true, a controversy between the two foreign corporations and the complainant, but obviously it is not a controversy in which they alone are concerned, and which can be fully determined as between them without the presence of the other defendants in their capacity as trustees for the complainant. The suit embraces a single indivisible controversy, on one side of which is the complainant, a citizen of Illinois, and on the other side of which, as indispensable parties defendant, are corporations of New York and citizens of Illinois. Upon the authority of *Blake v. McKim*, 103 U. S. 338; *Barney v. Latham*, Id. 205; *Removal Cases*, 100 U. S. 457; *Evans v. Faxon*, 10 FED. REP. 312, and other cases, (10 Wall. 172; 18 Wall. 5; 16 Wall. 446; 20 Wall. 130; 21 Wall. 36,) the cause must be remanded to the state court for hearing. It is so ordered.

In this disposition of the case the circuit and district judges concurred.

CRAMER v. MACK.

(*Circuit Court, S. D. New York. April 22, 1882.*)

1. REMOVAL OF CAUSE—TERM AT WHICH CAUSE COULD BE FIRST TRIED.

Where issue had been joined by the service of an answer, which answer did not require a replication, and the cause was noticed for trial and placed on the calendar, but within the time allowed by the Code of Practice defendant served an amended answer, the exercise of that right did not enlarge his time for removal, and a motion to remove after that term is too late.

2. PRACTICE—AMENDED PLEADINGS.

An amended pleading, unless stricken out by the court, supersedes the original, and nullifies a notice of trial which may have been served by the adverse party before the amendment.

WALLACE, C. J. The motion to remand this action to the state court presents the question whether this cause could have been tried at the January term of the court of common pleas for the city and county of New York, within the meaning of that clause of the removal act of March 3, 1875, which requires the petition for removal to have been filed "before or at the term at which said cause could first be tried." If the cause could have been tried at that term the petition was filed too late, and the motion to remand must prevail.

Issue had been joined by the service of an answer to the plaintiff's complaint, which answer did not require a replication. Thereupon

the plaintiff noticed the cause for trial and placed it on the calendar in due season for the January term, but within 20 days from the service of the original answer the defendant served an amended answer. After this term of the state court the defendant filed his petition for removal. By the practice in this state, within 20 days after a pleading is served it may be once amended, as of course, subject to the right of the opposite party to have the amended pleading stricken out by the court if it is made to appear that the amendment was for the purpose of delay, and that the benefit of a term will be lost thereby. The amended pleading, unless it is stricken out by the court, supersedes the original pleading, and nullifies a notice of trial which may have been served by the adverse party before the amendment. The right to amend is not *per se* a stay of proceedings, and if the cause has been noticed for trial the party who noticed it may bring on the cause; and if it is reached before an amended pleading is served, the cause may be tried, and thereafter an amendment is of no avail.

It was obviously the intention of the removal act to preclude a party from resorting to the expedient of a removal in order to deprive his adversary of the opportunity to try the cause, and the decisions in construction of the act are to the effect that a party loses his right to remove if he permits the term to pass at which he could have placed the cause in a position to be tried upon the merits if he had conformed to the rule of practice of the state court. When there is an issue which, by the practice of the court, can be brought to trial, the cause is triable; and if noticed for trial the court can entertain it, and it matters not whether the parties are otherwise ready for trial or not, or whether the court will see fit to entertain the trial or not. *Gurnee v. County of Brunswick*, 1 Hughes, 270; *Ames v. Colorado R. Co.* 4 Dill. 261; *Scott v. Clinton, etc., R. Co.* 6 Biss. 529.

In *Knowlton v. Congress & Empire Spring Co.* 13 Blatchf. 170, it was held that where either party could notice the cause for trial at a term, that term must be considered the term at which the cause could be first tried; and in *Forrest v. Edwin Forrest Home*, 17 Blatchf. 522, Judge Blatchford held that the defendant lost his right to remove when, the cause being at issue and triable on the merits, he might have noticed it for trial. Other decisions intimate a severer rule, and hold that if the cause could have been triable if the party seeking to remove had used due diligence in progressing the cause, the term at which it could have been ready for trial is the term intended by the act.

The present cause was triable at the January term of the state court. The defendant had the power and the right to defeat the trial by serving an amended answer. The exercise of that right did not, however, enlarge his time for removal. There was an issue which it was competent for either party to bring to a hearing, and which the plaintiff sought to bring to a trial. The plaintiff was prevented from trying the cause by the act of the defendant. It does not avail the defendant that the practice of the court gave him the right thus to defeat the plaintiff from trying the cause.

The motion to remand is granted.

COTTRELL v. PIERSON, Sheriff, and others.

(Circuit Court, D. Nebraska. May, 1881.)

1. JUDGMENT—LIEN OF.

The lien of a judgment is not lost by a failure to prove the claim of the judgment creditor in subsequent proceedings in the bankruptcy court against the judgment debtor.

2. SAME—PRIORITY OF LIEN OF JUDGMENT OF UNITED STATES.

A judgment in favor of the United States is not prior and paramount to a lien created upon the debtor's property existing before the proceedings in bankruptcy, which give the statutory priority to a debt due to the United States.

Bill in Equity.

Towle & Reavis, for complainant.

Schoenheit & Thomas and *S. A. Fulton*, for respondents.

McCARY, C. J. By the law of Nebraska a judgment rendered by the district court of that state is a lien upon the real estate of the defendant in such judgment, situated within the county where rendered. Assuming that a judgment of the United States district court is a lien in like manner and to the same extent as if rendered by a state court of general jurisdiction, it follows that the judgment of the Springfield Manufacturing Company, being earliest in date, is the first lien, unless it has been divested or displaced by the proceedings in bankruptcy against Cameron, the judgment debtor, or is held subordinate to the latter judgment upon the ground that the latter is a judgment in favor of the United States and entitled to priority on that account.

It will be observed that the judgment of the Springfield Manufacturing Company was obtained over two years before the commence-

ment of the proceedings in bankruptcy, and that there is no charge of fraud or collusion in obtaining the rendition thereof. Did the failure of the plaintiff in said judgment to prove its claim in the bankruptcy court deprive it of its lien? I think not. There is high authority for the proposition that the lien of a creditor on the real estate of a bankrupt is not lost by his failure to prove his debt. *Assignee of Wicks v. Perkins*, 1 Woods, 383; 13 N. B. R. 280. The creditor in such a case may rely upon his security and omit to prove his claim in bankruptcy, and by so doing he will lose only his claim against the general estate of the bankrupt. The law did not require the lienholder to prove his debt in order to save his lien. Having a judgment in the state court by which his lien was established, he had no occasion to apply to the bankruptcy court for aid in its enforcement. Whether the judgment creditor in this case could have caused execution to issue and had his judgment enforced by sale pending the bankruptcy proceedings may admit of some question, since the estate was in a certain sense *in custodia legis*. In the case above cited, Judge Woods expressed the opinion that the lien could have been enforced either before or after the end of the proceedings in bankruptcy. However this may be, I am clearly of opinion that after the proceedings in bankruptcy had terminated, there was nothing in the way of the enforcement of the lien of the judgment in the state court by execution and sale. *Freeman*, Judg. 28, 29; *Second Nat. Bank v. Nat. Bank*, 14 Am. Law Reg. 281.

The question remains whether the judgment in favor of the United States, under which complainant purchased, was a lien prior and paramount to that created by the earlier judgment in favor of the Springfield Manufacturing Company. The affirmative of this proposition must be maintained, if at all, under the provisions of sections 346 and 5101 of the Revised Statutes of the United States.

The first of these provides that "whenever any person indebted to the United States is insolvent * * * the debts due the United States shall be first satisfied," and this priority is declared to extend to cases in which an act of bankruptcy is committed. Section 5101 provides that in the order for a dividend in a bankruptcy proceeding, after paying certain costs and expenses, "debts due the United States shall have priority."

It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency." *U. S. v. Lewis*,

13 N. B. R. 38; *Conard v. Ins. Co.* 1 Pet. 438; *Brent v. The Bank*, 10 Pet. 596.

In so far as the early case of *Thelusson v. Smith*, 2 Wheat. 396, may have asserted a different doctrine, it is overruled by the later decisions of the supreme court of the United States above cited. As the lien of the judgments in favor of the Springfield Manufacturing Company existed more than two years before the insolvency of Cameron, it follows, by the rule above laid down, that it is not displaced by the subsequent judgment in favor of the United States.

The exceptions to the answer are overruled, and its averments being admitted, there must be decree for respondents.

HEBERT v. MUTUAL LIFE INS. CO.

(Circuit Court, D. Oregon. July 19, 1882.)

1. EQUITY—SPECIFIC PERFORMANCE OF CONTRACT.

Equity has jurisdiction to enforce the performance of a contract to deliver a policy of insurance, and having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain it for the purpose of decreeing payment of the policy.

2. CERTAINTY.

A contract to issue a plain life insurance policy upon the life of the applicant for \$15,000, payable to his wife, according to the form in use by the company, is sufficiently certain to be enforced; and if there is any extrinsic reason why it should not be enforced, as that it was procured by fraud or falsehood, it must be set up as a defence.

In Equity. Specific performance.

William H. Holmes, for plaintiff.

Thomas N. Strong, for defendant.

DEADY, D. J. This suit is brought to enforce a contract for the delivery of a life insurance policy for the sum of \$15,000, and for a decree that the defendant pay the same to the plaintiff.

The bill alleges that the defendant, on June 11, 1878, and since, was and has been a corporation organized under the laws of New York, and doing a life insurance business in Oregon; that on said day Oliver Hebert, of Marion county, Oregon, the husband of the plaintiff, applied to the agents of the defendant in said county for insurance upon his life of \$20,000, payable to the plaintiff, and paid them the first quarter's premium thereon, to-wit, \$105.60, which sum was by them forwarded to the defendant upon the condition "that if the

amount of the risk should be reduced a proportionate share of the premium should be refunded," and if the whole application should be rejected it would all be refunded; that subsequently the defendant rejected \$5,000 of said application, and on August 26, 1878, remitted to said Hebert \$26.40 of said payment, and "accepted, received, and retained" the remaining \$79.20 as the premium upon the first quarter of such insurance, and in consideration thereof "did insure the life of said Hebert from such time in the sum of \$15,000," payable upon the death of said Hebert to the plaintiff; and also agreed "to issue and deliver unto said Hebert a 'plain life insurance policy' upon his own life, according to the customary form adopted and in use by the defendant, for said sum payable as aforesaid," which agreement it has hitherto neglected and refused to perform; that about September 8, 1878, at said county, said Hebert died, and the plaintiff thereupon demanded of the defendant said policy and the payment of said insurance, which was refused; and that, by reason of the refusal to issue said policy, the plaintiff is unable to "enforce her rights in an action at law," wherefore she brings this suit and prays the defendant may be required to deliver to her "a plain life insurance policy" upon the life of said Hebert for the sum aforesaid, to take effect from the date of the contract aforesaid, and payable to the plaintiff, and for a decree against the defendant for said sum of \$15,000, with interest.

The defendant demurs to the bill because (1) the plaintiff, upon the case stated, is not entitled to the relief prayed for; (2) the policy is not sufficiently described; and (3) the plaintiff has an adequate remedy at law.

The jurisdiction of a court of equity to compel the specific performance of a contract for insurance is well established. The policy cannot be obtained by an action at law, although one might be maintained upon it for the insurance after it is issued. But a court of equity having taken jurisdiction for the purpose of compelling the delivery of the policy, will retain it where there has been a loss or death, for the purpose of decreeing payment of the policy, both to avoid expense and because the latter relief is a mere incident of the former. *Ang. F. & L. Ins. § 34; Perkins v. Washington Ins. Co. 4 Cow. 645; Carpenter v. M. S. Ins. Co. 4 Sandf. Ch. 408; Brugger v. S. I. Ins. Co. 5 Sawy. 304.* Nor does there appear to be any uncertainty as to the nature of the contract, or the form or effect of the policy, as stated in the bill. The agreement was for "a plain life insurance policy" upon the life of the deceased for \$15,000, payable

to the plaintiff "according to the customary form adopted and in use by the defendant," for which it was paid and had received one quarter's premium.

If there is any reason not appearing on the face of the bill why the defendant should not be compelled to perform its contract, as that it was procured by fraud or falsehood, the defendant can set it up as a defence.

The demurrer is overruled.

NORTHERN ILLINOIS COAL & IRON CO. OF LA SALLE v. YOUNG and others.

(Circuit Court, N. D. Illinois. July 7, 1882.)

1. BILL OF REVIEW—FRAUD—RIGHT TO FILE.

An original bill, in the nature of a bill of review, for fraud, may be filed as matter of right without leave of court.

2. SAME—BY CORPORATION.

Such a bill, assailing a decree in a foreclosure suit against a corporation, may be filed by the corporation in its own name, after the functions of the receiver have ceased, and without first obtaining his assent.

Lawrence, Campbell & Lawrence and *Mr. Doolittle*, for complainant.
Mason Brothers, for defendants.

HARLAN, Justice, (*orally*.) On the thirteenth or fifteenth of May, 1876, James L. Young, Mason Young, and Henry L. Young commenced in this court a suit for the foreclosure of a mortgage executed by the present complainant upon its property. A decree of sale was entered March 26, 1877, and an order requiring the master to sell the property to satisfy the mortgage debt was entered April 3, 1878. The sale occurred in 1878, and the deed to the purchasers (defendants here) was approved on the twenty-seventh of February, 1880. This suit was commenced on November 7, 1881. The bill charges that the acts of the complainants in the foreclosure suits in obtaining the decree of sale, and in the conduct of the sale, constituted a fraud upon the court and upon the company, and that for reasons set out in the bill the sale should be set aside. The prayer of the bill is that the decree of foreclosure be declared fraudulent and void; that an account be taken of what, if anything, is due on the mortgage; of the rents and profits received during the foreclosure proceedings, to the end that it may be ascertained whether the mort-

gage debt has not been fully satisfied; that the complainants be permitted to redeem the property on payment of the amount due on the mortgage debt, which, it is alleged, complainant is ready and willing to do; that the property be resold in separate parcels, under a decree of this court; and that the personal property be sold where it is located, and subject to the inspection of bidders. The case is now submitted upon defendants' motion to dismiss the bill upon the following grounds: (1) It was filed without leave of the court first had for that purpose; (2) it was not filed by or with the authority of the receiver of the Northern Illinois Coal & Iron Company, appointed in the foreclosure suit, who alone, it is claimed, had the right to use the name of the company for the purposes of such a suit as this; (3) the time within which such a bill could be filed had expired when this suit was commenced.

Held, the motion to dismiss proceeds mainly upon the ground that the bill is a bill of review of the class which may not be filed without leave of the court. But this position, it seems to the court, cannot be sustained. The present bill, although possessing some of the characteristics of a bill of review, is, in its essential features, an original bill, in the nature of a bill of review, for fraud. It may be filed as matter of right, and without leave of court. Story, Eq. Pl. (8th Ed.) 426, and notes; 2 Daniell, Ch. Pr. (4th Ed.) 1584. This disposes of the question of limitation, since the suit was brought within five years from the decree of sale. That is the limitation in this state upon actions of law for damages, and by analogy the same limitation should be applied to original bills for fraud in obtaining a decree. And even that time may be enlarged when there has been fraudulent concealment of the facts and circumstances constituting the alleged fraud. Rev. St. Ill. 1881, p. 943.

The objection that this suit could not be brought in the name of the company without authority from the receiver in the foreclosure suit is overruled. In so deciding the court must not be understood as now passing upon the question, raised by complainant's counsel, as to whether the original order appointing the receiver in the foreclosure proceedings was not void. The property sought to be redeemed is in possession neither of the company nor the receiver. The functions of the latter ceased when the proceedings in the foreclosure suit terminated. If the right of redemption exists at all, it is proper that it should be asserted. If the receiver might have sued of his own motion, that right is not exclusive of the right of the corporation itself to sue and be sued. If the corporation could not sue

or be sued with reference to the property involved in the foreclosure suit, while that suit was pending, there is no reason why, after the termination of that suit, it might not, in apt time and in its own name, without consulting the receiver, bring an original bill for fraud, to the end that it might recover its property and resume its business. Of course the court does not mean to express any opinion upon the merits of the case, but only to dispose of the motion in the light of the allegations of the bill. The motion to dismiss is overruled.

LOWENSTEIN and another v. CAREY and another.

SCHOOLFIELD and others v. SAME.

(*District Court, N. D. Mississippi. June Term, 1882.*)

1. TRIAL—PRACTICE—PRODUCTION OF BOOKS AND WRITINGS.

The party requiring the production of books or writings should move for a rule requiring their production, describing the books or papers with sufficient certainty, and should state to the best of his knowledge, information, and belief that the books or papers called for will tend to prove the issue in his favor. The motion should further state the facts which the books will prove pertinent to the issue. The truth of the allegations stated in the motion should be verified by the affidavit of the mover or his agent, and the materiality of the testimony sought be certified to by counsel of the mover.

2. SAME—NOTICE REQUIRED.

Notice must be given the party required to produce the books or writings, or his attorney, in sufficient time for the party to appear and show cause why the rule should not be made, and if issue is made on the motion the court may grant or refuse the rule according to the proof.

3. SAME—PENALTY.

Where the inconvenience and expense attending the production of books and papers is very great, and where the sworn copy of the entries from the books is given, or proposed to be given, a very strong case of the necessity for their production should be made, to compel their production or be subjected to the penalty.

HILL, D. J. The question now for decision arises upon the motion of plaintiffs against the claimants to produce upon the trial of this issue the books, papers, correspondence, and documents in their possession or under their control relating to the dealings between them and the defendants, Carey & Richardson. This motion is resisted by the claimants, and the question is, shall the motion be sustained and the rule made? This motion is made under section 724, Rev. St., which reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. If a plaintiff fails to comply with such order, the court may on motion give judgment as in case of nonsuit, and if a defendant fails to comply with such order, the court may on motion give judgment against him as by default."

The proper practice under this statute is for the party requiring the production of such books or writings to spread on the motion docket a motion for a rule upon the opposite party requiring the production of the books or papers desired. The motion should describe the books or papers with as much certainty as may be, and should further state that, according to the best of the mover's knowledge or information and belief, the books or papers called for will tend to prove the issue in favor of the mover. The motion should further state some fact or facts which the books or papers will tend to prove, pertinent to the issue, which issue should be made up before the motion is made, so that the court may determine the pertinency of the fact or facts which it is alleged the books or papers will tend to prove. What they will prove can only be determined after their production.

The truth of the allegations stated in the motion should be verified by the affidavit of the mover, or his agent, and the materiality of the testimony sought by the production of the books or papers certified to by the counsel of the mover. Notice must be given the party required to produce the books or writings, or his attorney, a sufficient length of time for the party to appear and show cause, if any he has, why the rule shall not be made, when he may, in opposition to the rule, show by affidavit that he has no such books or papers under his control, or any other reason he may have why the rule shall not be made. If any issue is made upon the motion the court will hear proof, and grant or refuse the rule according to the proof and nature of the case.

The claimants insist that this motion comes too late. The issue could not well have been tried until after the attachment suit was tried and the judgment rendered against the defendants in the attachment suits. Indeed, the issues have not been made up. I am satisfied the motion is in time, but the grounds stated in the motion are not as full and specific as they should be. The movers will have leave to amend the motion so as to conform to the rule stated, when sufficient time will be allowed the claimants to answer the motion,

after which the court will make such rule as may be required, to the end that a fair trial may be had with as little expense and inconvenience as may be to either party. As a general rule, the production of correspondence and other papers can be complied with without much inconvenience or expense. More expense is incurred in the production of books, but the inconvenience is small unless they are in daily or frequent use; but where they are in such use the inconvenience is often very great, and where a sworn copy of the entries from the books is given, or proposed to be given, a very strong case of the necessity of the production of the books themselves should be made to compel their production, or to subject the delinquent to the penalty prescribed.

NOTE.

PRODUCTION OF BOOKS OR WRITINGS. Section 724, Rev. St., limits the remedy to cases where issue is joined.(a) It does not take away the right to relief by bill of discovery except where the remedy is given.(b) Its provisions extend to proceedings *in rem* to enforce a forfeiture,(c) and to cases in bankruptcy.(d) The order can be made only in cases where relief might have been had by bill of discovery;(e) and that a bill of discovery has been filed is no bar to the motion;(f) nor that a copy of the paper has been filed in answer to the bill of discovery,(g) unless the discovery has been completely effectual;(h) but it does not apply in a case where a subpoena *duces tecum* issues to compel a witness to produce papers.(i) In requiring the production of books or writings in evidence, federal courts are governed by this section, and not by the provisions of state statutes.(j) The formalities of a bill of discovery are not requisite; a mere motion with notice to the opposite party, and a description of the books or papers with sufficient certainty, is sufficient;(k) and where letters are described by their subject-matter it is sufficiently explicit.(l) The applicant must show that the paper exists; that it is in possession of the party, and that it is pertinent to the issue.(m) An *ex parte* affidavit is sufficient;(n) a motion is requisite;(o) and it may be made before the day of trial;(p) and notice to the party required to produce the books or writings must be given;(q) and it must contain information that a motion will be made for a nonsuit, or

(a) Jacques v. Collins, 2 Blatchf. 23; U. S. v. Hutton, 25 Int. Rev. Rec. 37.

(b) U. S. v. Hutton, 25 Int. Rev. Rec. 37; Bryant v. Layland, 6 Fed. Rep. 127.

(c) U. S. v. Barrels, 10 Int. Rev. Rec. 205. But see U. S. v. Packages, Gilp. 306.

(d) In re Mendenhall, 9 Bank. Reg. 285.

(e) Finch v. Rikeman, 2 Blatchf. 301.

(f) Iasigi v. Brown, 1 Curt. 401.

(g) Iasigi v. Brown, 1 Curt. 401.

(h) Iasigi v. Brown, 1 Curt. 401.

(i) U. S. v. Babcock, 3 Dill. 566; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201.

(j) Gregory v. Chicago, M. & St. P. R. Co. 10 Fed. Rep. 529.

(k) Jacques v. Collins, 2 Blatchf. 23.

(l) Vasse v. Mifflin, 4 Wash. C. C. 519.

(m) Triplett v. Bank of Washington, 3 Cranch, C. C. 646; Jacques v. Collins, 2 Blatchf. 23; Iasigi v. Brown, 1 Curt. 401; Bas v. Steele, 3 Wash. C. C. 381.

(n) U. S. v. Packages, Gilp. 306.

(o) Thompson v. Selden, 20 How. 194; Maye v. Carbery, 2 Cranch, C. C. 336; Bank of U. S. v. Kurtz, Id. 342; Macomber v. Clarke, 3 Cranch, C. C. 347; Bas v. Steele, 3 Wash. C. C. 381.

(p) Central Bank v. Taylor, 2 Cranch, C. C. 427; Iasigi v. Brown, 1 Curt. 401.

(q) Maye v. Carbery, 2 Cranch, C. C. 336; Thompson v. Selden, 20 How. 194; Bas v. Steele, 3 Wash. C. C. 381.

for judgment by default.(r) It may be given to the party or to his attorney,(s) and must be reasonable;(t) for an order will not be made at the trial on motion without notice.(u) If not reasonable the trial may be postponed to give the party an opportunity to procure the evidence.(v)

The power to grant the motion is discretionary, but should be firmly exercised in a proper case.(w) The court may at once either refuse the motion or make the rule absolute,(x) and where an intent to conceal or destroy the books or papers is shown, the order should be made without delay, and absolute; but if there is no suggestion of fraudulent intent, and the evidence as to their pertinency is not satisfactory, the order *nisi* should be made.(y) The order need not be absolute, but may leave the party to show cause at the trial.(a) Where the motion is made before trial, the order must require the production of the books at the trial,(b) and it may require him to produce them and leave them with the clerk, or furnish copies to the adverse party;(c) but the word "require" does not include the power to compel compliance;(d) as the penalty for a failure to produce a paper is nonsuit or default,(e) and a motion for *non pros.* for failing to produce may be made even after the jury is sworn.(f) A party cannot be compelled to produce a paper which would subject him to a penalty or a forfeiture.(g)

The order must be served a reasonable time before the production of the paper is required.(h) It is premature before the jury are sworn and the trial commenced for either party to call upon the other to produce a paper which he has received notice to produce on the trial;(i) he has no right to examine them before trial to discover if there is in them anything pertinent to the issue;(j) but the books must be produced at the trial or an excuse given under oath for not producing them;(k) so, he may make oath that they are not in his possession;(l) and such oath may be met by contrary proof.(m) If the omission to produce the books arose from oversight, the case may be postponed to allow time to procure the affidavit of the party.(n) If by affidavit he explains how the paper came into his possession, the court may order the affidavit put in evidence with the paper.(o) If a party inspects a book after its production, it may be used as evidence by the adverse party.(p) After removal of a cause from a state court the circuit court should enforce an order made in the state court for the production of books or papers.(q)—[Ed.

- (r) *Bas v. Steele*, 3 Wash. C. C. 381.
- (s) *Geyger v. Geyger*, 2 Dall. 332; *U. S. v. Barrels*, 10 Int. Rev. Rec. 206.
- (t) *Macomber v. Clarke*, 3 Cranch, C. C. 347.
- (u) *Sampson v. Johnson*, 2 Cranch, C. C. 107; *Bank of U. S. v. Kurtz*, Id. 342.
- (v) *Geyger v. Geyger*, 2 Dall. 332; *Bank of U. S. v. Kurtz*, 2 Cranch, C. C. 342.
- (w) *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201.
- (x) *Dunham v. Riley*, 4 Wash. C. C. 126.
- (y) *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201.
- (z) *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201; *Isigil v. Brown*, 1 Curt. 401; *Dunham v. Riley*, 4 Wash. C. C. 126.
- (a) *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201; *Isigil v. Brown*, 1 Curt. 401. But see *Central Bank v. Taylor*, 2 Cranch, C. C. 427.

- (c) *Jacques v. Collins*, 2 Blatchf. 23.
- (d) *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201.
- (e) *Isigil v. Brown*, 1 Curt. 401.
- (f) *Waller v. Stewart*, 4 Cranch, C. C. 532.
- (g) *Finch v. Rikeman*, 2 Blatchf. 304; *U. S. v. Packages*, Gilp. 306.
- (h) *Macomber v. Clarke*, 3 Cranch, C. C. 347.
- (i) *Hylton v. Brown*, 1 Wash. C. C. 293.
- (j) *Triplett v. Bank of Washington*, 3 Cranch, C. C. 646.
- (k) *U. S. v. Barrels*, 10 Int. Rev. Rec. 206.
- (l) *U. S. v. Packages*, Gilp. 306; *Macomber v. Clarke*, 3 Cranch, C. C. 347.
- (m) *Bas v. Steele*, 3 Wash. C. C. 381.
- (n) *U. S. v. Barrels*, 10 Int. Rev. Rec. 206.
- (o) *Bank of U. S. v. Wilson*, 3 Cranch, C. C. 213.
- (p) *Waller v. Stewart*, 4 Cranch, C. C. 532.
- (q) *Williams Mower Co. v. Raynor*, 7 Biss. 245.

EMMA SILVER MINING Co., (Limited,) of London, v. EMMA SILVER MINING Co., of New York, and others.

(Circuit Court, S. D. New York. June, 1882.)

1. PRACTICE—DISMISSAL OF BILL—AUTHORITY.

Where the denial of the authority of a liquidator, acting for a corporation under its corporate seal, is qualified, and insufficient to meet the presumption arising from the use of the corporate seal, he will be deemed to have authority to release the action, where it is alleged that he possesses such power.

2. SAME—SETTLEMENT OF CASE—ATTORNEY'S LIEN.

An attorney's lien cannot preclude the defendant from settling the cause of action with complainant where such settlement is not surreptitious or unfair, and complainant is pecuniarily responsible.

On Motion to Dismiss.

WALLACE, C. J. Under the circumstances of this case, if the authority of McDougall to release the cause of action and stipulate for a discontinuance were specifically controverted, I should be disposed to deny the motion to dismiss the bill, and put the defendants to a plea. The qualified denial made by the complainants' solicitor, however, is not sufficient to meet the presumption arising from the use of the corporate seal. The seal itself is *prima facie* evidence that it was affixed by proper authority. It is not denied that McDougall is the duly-appointed liquidator of the corporation, or that he was authorized to release the cause of action. The denial that he "has been appointed, with the duties and powers alleged by the defendants," may be entirely true, for their allegation is that he possesses various powers and duties beyond those requisite for the present purposes. The attorney's lien cannot preclude the defendant from settling the cause of action with the complainant. It is not asserted that there has been a surreptitious or unfair settlement, or that the complainant is not entirely responsible pecuniarily.

Motion to dismiss the bill is granted.

See same parties, 7 FED. REP. 401.

PICTET ARTIFICIAL ICE CO. v. NEW YORK ICE MACHINE CO.

(Circuit Court, S. D. New York. June 8, 1882.)

PRACTICE—DISCONTINUANCE—DISMISSAL.

Consent and order for discontinuance are, in effect, a dismissal of the bill.

WALLACE, C. J. The consent and order for a discontinuance are, in effect, a dismissal of the bill. The complainant has the right to dismiss, with costs to the defendant, at the present stage of the case, as of course. I suggest, however, that a formal rule "dismissing" the bill be entered by complainant.

UNITED STATES v. LEE.

(Circuit Court, N. D. New York. June Term, 1882.)

1. EMBEZZLEMENT—NATIONAL BANKING ASSOCIATION.

The first clause of section 5209 of the Revised Statutes provides for three distinct offences: *First*, embezzlement; *second*, abstraction; and, *third*, wilful misapplication of the moneys, funds, or credits of the bank by any president, director, cashier, teller, clerk, or agent of any association organized as a national banking association.

2. SAME—MISAPPLICATION—CONVERSION.

It was the intention of congress to make criminal the misapplication and conversion of the funds of national banking associations without regard to whether or not the party so misapplying received any of the funds or other advantage, directly or indirectly.

3. SAME—INTENT.

If it appears that the funds of the banking association have been abstracted or wilfully misapplied by defendant, he is precluded from denying that it was done with unlawful intent.

COXE, D. J., (*charging jury*.) The prisoner at the bar stands indicted for having done various acts in violation of section 5209 of the Revised Statutes of the United States, while he was acting as president of the First National Bank of the city of Buffalo. The indictment is framed under this section, and the effort on the part of the prosecution and the defence has been, on the one side, to establish the guilt, and, on the other, the innocence, of the defendant, having reference solely to the crimes there enumerated. Although it has been read in your presence many times, it seems to me important that at the outset of your deliberations you should understand

thoroughly the law as applicable to this case in its full scope and meaning. With that view, I desire to call your attention again to this section of the law:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association with, intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor." etc.

The defendant is indicted under the first clause of the section, which I have read. I do not understand that it is insisted upon either side that the subsequent parts of the statute are applicable in any view to the case before you. The first sentence, or rather the first clause, of this section provides for three distinct and separate offences: the crime of embezzlement, the crime of abstraction, and the crime of wilful misapplication of the moneys, funds, or credits of the bank. The defendant is not indicted for putting in circulation any of the notes of the association, or for issuing any certificate of deposit, drawing any order or bill of exchange, making any acceptance, assigning any note, bond, draft, bill of exchange, mortgage, judgment or decree without authority from the board of directors of the bank; nor is he indicted for making any false entry in any book or in any report. And, gentlemen, it may be proper at this time to call your attention to the fact—because the subject has been discussed somewhat by counsel—that he is not indicted because, while acting as president of the bank, certain of its customers, himself among the rest, borrowed from the bank more than 10 per cent. of the capital stock, in violation, as the prosecution insists, of section 5200 of the Revised Statutes; nor is he indicted for discounting the paper of his relatives and friends. Whatever views we may entertain as to the legality and propriety of such conduct, his action in this respect is not called in question by this indictment. I should, perhaps, say further that the defendant is not here charged with

crime in allowing his reserve funds to decrease or become less than the amount required by law, nor is he charged with wrecking the bank. The proof bearing upon all of these alleged infractions and violations of the law is important, however, upon the question of intent.

It is not necessary, in order to find the defendant guilty of any of the crimes charged, that you should find that the bank failed by reason of his acts. A cashier, president, or director of a national bank may abstract and misapply its funds without any disaster such as has been detailed in this case occurring to the bank. Bearing in mind, then, that this indictment is framed solely, as I understand it, under the first clause of the section quoted, and recurring to that clause for a moment, it will be perceived that it enumerates, as stated, three distinct and separate crimes. If upon this evidence you find the defendant guilty of any one of them; if you find that he has taken the funds of the bank in violation of law, no matter how small the amount may have been,—it is sufficient to sustain a verdict of guilty. These offences are stated disjunctively in the statute: "Any president, director, or cashier who embezzles," or "who abstracts," or "who wilfully misapplies." A casual reading of this section might induce an unobserving person to assume that the three words were synonymous, or nearly so; but there is a distinction to which I desire very briefly to call your attention. The crime of embezzlement is a species of larceny, and is applicable to the stealing of property by clerks, agents, servants, parties acting in fiduciary capacities, and, under this statute, by a president, cashier, or director of a national bank. In order to constitute this crime it is necessary that the property embezzled should come *lawfully* into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes. It is distinguishable from the crime of larceny in this respect, that the property comes *lawfully* into his possession, and is unlawfully taken by him. In the crime of larceny, on the contrary, it is unlawfully taken and retained. The crime of abstraction, made so by the statute, applies to cases where one for his own benefit takes the property of another; but it is not necessary that any position of trust should exist between the parties; nor is it necessary that the property should come lawfully into the possession of the person abstracting it. The other crime is the wilful misapplication of the funds, credits, and money of the bank; and by the word "wilfully," the congress meant "designedly"—where one of the persons mentioned in the section *designedly* and knowingly misapplies the property of

the bank. It is not necessary that the party who misapplies should derive any benefit from the transaction. It was the intention of congress to make criminal the misapplication and the conversion of the funds of national banking associations, without regard to whether or not the party so misapplying received any of the misapplied funds, or other advantage, directly or indirectly. If you come to the conclusion that the property, money, and funds of this bank were wilfully misapplied, it is not necessary, in order to establish guilt, that any benefit should have come to this defendant; and that view of the statute is borne out by a reference to the subsequent sentence in it having reference to intent, to which I will call your attention more particularly in a moment. It provides that these acts must, each of them, be done with intent to defraud or injure the association. When the word "defraud" is used, it necessarily implies that advantage comes to the party defrauding, and corresponding damage to the party who is defrauded; but the word "injure" has no such application. That word is used in designating an injury which may come to the party whose property is taken, without any reference to whether the party who converts it is benefited or not. This, then, gentlemen, is the statute under which the defendant is accused. He stands indicted here by a pleading containing many counts, twelve in all, charging him with various offences. To the indictment he has interposed a plea of not guilty. He has pleaded a general denial, and that throws upon the prosecution the burden of proving beyond a reasonable doubt that he has been guilty of one of the offences charged; not all of them, but one of them.

It is proper that I should call your attention to the well-known rule of criminal law that every man is presumed innocent until the contrary is proved; and it is also proper that I should say that if, upon this evidence, there is a reasonable doubt in the mind of any one of you as to the guilt of the defendant, it is your duty to give him the benefit of that doubt. In this case, as in most criminal cases, the essence of the offence, or that which makes it criminal, is the intent with which it is done. The statute which I have read to you is explicit on this subject; and, as I have said, in order to find the defendant guilty, it is necessary that you should find that the acts complained of, the offences charged, were committed with the intent to defraud or injure the association. But, having said that, I desire also to say to you emphatically that the law presumes that every man intends the legitimate consequences of his acts. It will not do for a man to commit

an unlawful act, knowing that it is unlawful, and then assert that he did it with an innocent intent. If the evidence is susceptible of two constructions, the one pointing to guilt and the other to innocence, it is your duty to give that construction to it which is compatible with the innocence of the defendant. But if you are convinced that an unlawful act has been done; if, upon this evidence, you are satisfied beyond a reasonable doubt that the funds of this association have been embezzled, abstracted, or wilfully misapplied by this defendant,—then he is precluded from denying that he did it with guilty intent. Upon this question of intent you have a right to take into consideration all of the other alleged illegal transactions which have been mentioned, and to which I alluded some time ago as not included in this indictment, for the purpose of throwing light upon the acts of the defendant which are directly in issue. You have, upon the other hand, a right to take into consideration the evidence of his previous good character. I do not know, gentlemen, that it is necessary for me to dwell longer upon the law as applicable to this case.

Coming now to facts, I shall detain you but a few moments. After the exhaustive and able arguments to which you have listened, where every one of these transactions has been thoroughly and carefully discussed, it is neither necessary nor is it proper that I should attempt an extended presentation of the facts. The questions arising on the facts are to be decided by the jury; the court has but little to do with them. If I entertained an opinion as to the guilt or innocence of the accused it would be improper for me to express it in your hearing. It is for you to decide this question upon the proof, to sift the evidence, and by your verdict say where the truth is. In endeavoring to arrive at a correct conclusion it is sometimes well to take those facts which are conceded, undisputed, or incontestably proved. Starting with these facts, a jury desiring to arrive at the truth often receives an impulse which will lead to a correct conclusion. In other words, to use an illustration, a traveler, anxious to reach a certain point, by noting well the land-marks along his course while it is yet straight, can often obtain sufficient *data* to enable him to take the right direction when he reaches that point where the paths diverge.

It is undisputed that the First National Bank of Buffalo was a national banking association, created under the laws of the United States; that on the tenth day of January, 1882, Reuben Porter Lee, the defendant, was elected president of the bank, and occupied that position until the fourteenth of April, when the bank closed its doors

and refused to honor the checks of its depositors; that Lee, during this time, was the largest stockholder of the bank, and when the bank closed, or immediately preceding that time, he held in his own name some 700 shares of its stock. It is also undisputed that Herman J. Hall was indebted to the bank in a sum amounting to some \$204,000; and that upon the tenth of April, 1882, part of his indebtedness was overdue, and there was an overdraft which has been variously stated to be from twenty-one thousand to fifty thousand dollars. It is also undisputed that on that day an additional loan was made to Herman J. Hall of \$200,000, his notes taken for that amount, without indorsement, and cashier checks issued to him for that sum; that with the proceeds of these checks \$180,000 of indebtedness to the bank was paid, or assumed and pretended to be paid, and was so marked upon the books of the bank. It is also conceded that in the latter part of the year 1881, and in March, 1882, the defendant caused to be made reports of the condition of the bank, containing a statement of its resources and liabilities, calculated to inspire confidence in those dealing with it, the details of which you will remember.

We now reach a point where there is dispute; where two theories are advanced. The evidence naturally groups itself around three or four principal transactions, to which the attention of counsel on either side has been directed. The principal one, without question I think, is the last operation with Hall. It is of that transaction that the learned district attorney predicates the main accusation against the prisoner.

The position of the prosecution is this: That upon the tenth day of April the defendant knowing that Hall was a debtor to the bank to the amount of nearly a quarter of a million dollars, and that he was worthless; knowing that the bank was hopelessly insolvent, and knowing that there was a personal liability upon every share of stock which he held, transferred his stock to Hall, and took out of the bank the paper upon which he was held as indorser, or upon which his friends or the members of his family were held, and cancelled all of this indebtedness. That Lee, in connection with Hall, devised this scheme, which the prosecution insist was a grossly fraudulent scheme, arranged by them for the purposes indicated; and that by this means \$180,000 of the paper of the bank, which is presumed to have been good, and upon which the face value could have been realized, was taken out of the bank and wilfully misapplied and abstracted. That is the charge on the part of the prosecution.

For the defendant it is argued that, in the latter part of the year 1881, he was severely sick with a brain difficulty, and remained in that condition a week or 10 days; that when he came again to the bank he found himself unable to continue the business with safety to his health, and after making various efforts to induce Hall to reduce his line of discount, he at last told him (Hall) that he must close up his Chicago business, and pay the proceeds upon his indebtedness, or induce his friends to take charge of the bank at Buffalo; and that it was with the intention of placing the bank and its affairs in the hands of another and more responsible board of directors, and for the purpose of enabling Hall to manage the affairs of the bank to suit himself, and reduce his line of discount, that this transaction was entered into.

The evidence bearing upon these two theories you will keep in mind, and you will say upon the evidence which is the natural and fair one to adopt. If you find that this was a fraudulent device for the purpose of abstracting and misapplying the collectible paper of the bank; if you find that it was a scheme on the part of the defendant to discharge himself and his relatives from all liability to the bank upon the paper and upon the stock,—then, gentlemen, the indictment should be sustained and a verdict of guilty rendered. If upon the contrary, you can believe the version stated here by the defendant to be the correct one, the verdict should be not guilty.

Another transaction, to which the counsel have called your attention, is the purchase of the Vought stock. It seems that upon the eighteenth day of January, 1882, through Mr. John Otto, a stock-broker in Buffalo, the defendant purchased 152 shares of the capital stock of the bank. There is no dispute that the stock was paid for out of the funds of the bank. A draft was given by Lee, as cashier of the bank, upon its correspondent in New York, and the stock was paid for in that way. I do not understand that there is any dispute in the evidence about that. The stock was placed on the books of the bank in the name of the defendant. It seems that subsequently he sold various parcels of the stock, and upon his receiving pay for it he applied the amounts upon his indebtedness to the bank, which was carried along in the shape of an overdraft. But it is undisputed that there was a balance of some \$12,000 which was not paid by any sale of the stock, and which was an indebtedness existing at the time the bank closed its doors, and was taken up or assumed to be paid for by this alleged Hall discount upon the twelfth day of April, 1882. Upon the part of the defendant it is said that this transac-

tion was entered into for the purpose of getting an unfriendly stockholder out of the bank, and that the stock was taken in the name of Lee simply for convenience.

One of the other transactions is that with O. C. Read. It appears that a note of the bank was made for the purchase of some telephone stock. The stock was subsequently bought by Lee and put up as collateral security for the note. When the stock was sold at different times, Mr. Read came to the bank and paid the proceeds of the sale to Lee, who indorsed them on the back of the note, and they appear there in his handwriting. There is no evidence that these amounts were ever paid directly to the bank. On the contrary the evidence is that they were credited to Lee upon his private account with the bank, and retained by him. This note of Read was included in the number of notes that were taken up on the 12th by the alleged proceeds of the Hall discount. The defendant says that he did not pay this money to the bank for the reason that the note was not due, and to have done so would have been out of the usual course of business; that he intended to pay it when the whole amount of stock was sold. But in this connection you will remember that the note was payable on demand.

The other transaction which has been discussed was with Mr. Bull. The defendant went to Mr. Bull a short time before the bank failed, and asked leave to sell him 200 shares of the capital stock of the bank, and thereupon he gave Mr. Bull credit in the books of the bank for one item of \$40,000, and another of \$10,000, and took Mr. Bull's check for various amounts, making up the sum of \$50,000. Although the defendant says that he had the scrip in his pocket, and was ready to transfer it and then buy it back, it does not appear that there was any actual transfer of the stock made. It is said by the prosecution that this was one of the fraudulent devices resorted to at this time, when the defendant saw ruin staring him in the face, and when he was compelled to have recourse to these schemes to save himself and his friends, and that it was a fictitious transfer made for the purpose of covering up his methods in disposing of the funds and property of the bank. Upon the part of the defendant it is alleged that it was a harmless arrangement, and was entered into for the purpose of conveying to Hall the idea that the stock was coming from various parties, he having been told that the stock was owned by other parties, but that Lee could control it.

These are the transactions referred to and discussed by the counsel. You have heard all the proof bearing upon them. It is your duty to

apply the rules of law suggested to the evidence, and say upon the whole case whether or not the defendant is guilty. It is not a case for sympathy. You are empanelled to do your duty in the case, and if you find that the defendant is guilty, it is your duty to say so fearlessly, without reference to the consequences; without reference to any sympathy that may be felt by you for him, or for any one connected with him.

And now, gentlemen, I leave the case with you with the firm belief that you will render a fair and righteous verdict, and a true deliverance make between the government and the prisoner at the bar.

UNITED STATES *v.* CURTIS.

(*Circuit Court, S. D. New York. July 20, 1882.*)

1. CIVIL SERVICE—POLITICAL ASSESSMENT—PROHIBITORY ACT CONSTRUED.

Under the act of congress which prohibits "all executive officers or employes of the United States not appointed by the president, by and with the advice and consent of the senate," from "requesting, giving to, or receiving from any other officer or employe of the government any money or property or other thing of value for political purposes," the person indicted can only be tried for doing the thing which the statute prohibits; and unless this of itself, isolated from all its concomitants, can be competently made a crime by congress, the statute is nugatory.

2. SAME—GOVERNMENT OFFICIALS—POWER OF CONGRESS.

Congress may lawfully prescribe all needful regulations for the discipline of government officials, and may declare what infractions of discipline shall be treated as criminal offences, and it may prohibit co-operation between officials in the raising of funds for political purposes.

3. SAME—LEGISLATIVE DISCRETION.

In executing its power to prohibit acts of officers or employes which are incompatible with the proper discharge of their duties, or which impair the efficacy or tend to demoralize the public service, congress must exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency, and it is only when congress has palpably transgressed the limits of its discretion that the judicial department will intervene. It is sufficient to justify the exercise of legislative discretion if the prohibited acts tend to introduce interests which disturb the just equipoise of official relations.

Motion for New Trial and Arrest of Judgment.

The indictment against the defendant contained 11 counts. Upon the first and eighth he was convicted, and acquitted upon the others. To arrest judgment, or obtain a new trial, upon the counts mentioned, he filed the present motions.

The first count charged him with "receiving" five dollars "in money" from Peter Vogelsang, in October last, "for political purposes," to-wit, for the use of the Republican state committee, of which Curtis is alleged to have been a member, in the then-pending campaign, both Vogelsang and Curtis being (as it is alleged) then "employees" of the United States, not appointed by the President with the advice and consent of the senate.

The eighth count charges the like reception by Curtis, from Charles Treichel, of a certain "thing of value," to-wit, the bank check of Mr. Treichel for \$100 "payable to the order of him, the said Newton Martin Curtis," for the use aforesaid. There is the same allegation that each of these persons were then such "employees" of the United States, it being stated that Mr. Treichel was an "auditor" at the custom-house.

This indictment was found under the act of August 15, 1876, c. 287:

"Sec. 6. That all executive officers or employees of the United States, not appointed by the president, with the advice and consent of the senate, are prohibited from requesting, giving to, or receiving from any other officer or employe of the government any money or property or other thing of value for political purposes.

"And any such officer or employe who shall offend against the provisions of this section shall be at once discharged from the service of the United States.

"And he shall also be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding five hundred dollars." 19 St. 169, 1 Supp. Rev. St. 245.

S. L. Woodford, U. S. Dist. Atty., and *Everett P. Wheeler*, for the United States.

Edwin B. Smith, for defendant.

BRIEF OF DEFENDANT.

* * * * *

The constitution contains no clause and no grant of power upon which such a law, passed for such a purpose, can rest.

Certainly the authority for it is nowhere expressly given, nor does careful scrutiny reveal to us anything from which it can be derived, even by the most strained inference.

* * * * *

The congress of the United States is delegated with very limited legislative powers,—to do nothing which the constitution does not

first sanction. *Calder v. Bull*, 3 Dall. 387; *People v. Draper*, 25 Barb. 359; *Mason v. Wait*, 4 Scam. 134.

By reason of these limitations the legal presumption is that any cause is without the federal criminal jurisdiction until shown to be within it. *Turner v. Bank of North America*, 4 Dall. 11; *State v. Sanford*, 1 Nott & McC. 512.

* * * * *

It was "in order" to attain the great objects mentioned in this preamble [to federal constitution] that "the legislative powers herein granted"—and none other—were "vested in a congress of the United States," and these only for national purposes. 92 U. S. 549, 550, cited *infra*.

Article 1, § 4, of the constitution contains the first grant of legislative authority. It allows, to a limited extent, a revisory control over and amendment of the regulations made by the states with reference to the election of senators and representatives in congress. Authority over elections is circumscribed within the limitations of this section. There is none given over preliminary "campaigns."

The three succeeding sections (5, 6, and 7) relate merely to the forms of procedure in congress, the methods of organization, the compensation and privileges of its members.

The eighth section contains practically an enumeration of all the general, independent powers of legislation conferred upon congress. 25 Barb. 359, cited *ante*.

* * * * *

It will be perceived that each grant of legislative power in section 8 is based upon some subject-matter of appropriate federal cognizance, and not upon the existence of any relation of individuals to the government, with the single exception of those enrolled in the land or naval forces.

* * * * *

The subject-matter sets the bounds, which congress may not pass. No act committed within a state can be made an offence against the United States, "unless it have some relation to the execution of a power of congress, or to some matter within the jurisdiction of the United States. *U. S. v. Fox*, 95 U. S. 672; *Tennessee v. Davis*, 100 U. S. 260, 261.

* * * * *

An examination of the statutes, from the crimes act of April 30, 1790, (1 St. 112-119,) down, justifies me in emphasizing the asser-

tion that this act of August 15, 1876, c. 287, § 6, is the sole instance in the entire legislation of the country of basing a conviction of a crime upon the mere fact of the relation of the offender or the party injured to the United States, without regard to the effect of that act upon any subject-matter entrusted to the guardianship of the United States. See 1 Abb. U. S. Court Practice, c. 5, tit. "Crimes," pp. 460, 461.

In every other instance the purpose has been to guard and promote the interest of the United States. If, incidentally, the functionary (mail carrier, for instance) is protected in the discharge of his duty, it is simply in order that he may discharge the duty devolved upon him, not that the individual be exempted from physical pain or mental annoyance. *Osborn v. U. S. Bank*, 9 Wheat. 865; *U. S. v. Harvey*, 8 Law Rep. 77; *U. S. v. Parsons*, 2 Blatchf. 104, 108; *U. S. v. Gay*, 2 Gall. 359; *U. S. v. Hart*, Pet. C. C. 390; *U. S. v. Kirby*, 7 Wall. 482; *U. S. v. Sander*, 6 McLean, 598, 601.

* * * * *

It is only laws "necessary and proper" to effect constitutional purposes that congress is empowered to enact.

It cannot determine conclusively for itself the existence of the necessity for, nor the propriety of, its legislation; otherwise, its jurisdiction would be practically unlimited, instead of being restricted within comparatively narrow bounds.

When, by the passage of a law, on the one hand, and refusal to recognize its commands, upon the other, the issue of its necessity and propriety—and, consequently, of its validity—is raised, it is one for judicial investigation and determination. *Cooley*, Const. Lim. 44, 45, and notes; *Leiber*, Civ. Lib. & Self-Gov. 162–164; *De Tocqueville*, Dem. in Am. c. 6; *Story*, Const. § 1842; *Marbury v. Madison*, 1 Cranch, 176–178; *Osborn v. U. S. Bank*, 9 Wheat. 89; *De Chastellux v. Fairchild*, 15 Pa. St. 18, per *Gibson*, C. J.; *Bates v. Kimball*, 2 D. Chip. 77; *Van Horne v. Dorrance*, 2 Dall. C. C. 309; *Bowman v. Middleton*, 1 Bay, 252; *Grimball v. Ross*, Charlt. 175; *Bebee v. State*, 6 Ind. 501 *et seq.*; *Cronise v. Cronise*, 54 Pa. St. 263, top, affirming *Jones v. Jones*, 12 Pa. St. 356–7; *McCauley v. Brooks*, 16 Cal. 39 *et seq.*, per *Field*, C. J.; *Bayard v. Singleton*, 1 Martin, (N. C.) 42. See, also, Mr. Webster's speech on the Independence of the Judiciary, 3 Webst. Works, 29; similar language used in *Whittington v. Polk*, 1 Har. & J. 243.

The legislature no more represents the sovereignty of the people than either of the other departments. All equally derive their

authority from the same high source. *Bailey v. Phila., etc., R. Co.* 4 Har. (Del.) 402-403.

Chief Justice Marshall's authoritative definition of the above-quoted phrase is, of course, familiar. The summing up of his exhaustive discussion is: "Let the end be legitimate; let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 421.

In his Commentaries, Story says of this case, and of the language of the constitution: "It requires that the means should be, *bona fide*, appropriate to the end." 2 Story, Const. § 1253 *et seq.*

The inquiry before us, then, is: Does this statute seek, by appropriate means, adopted in good faith for that purpose, an end legitimate to be accomplished by federal legislation?

* * * * *

First, then, as to the end sought. What this is must be determined from the terms of the statute itself, irrespective of theory; because "nothing is more common than for a law to effect more or less than the intentions of the persons who framed it; and it must be judged of by its words and sense, and not by any private intentions of the members of the legislature." 2 Story, Const. § 1268, last sentence; *Atty. Gen. v. Sillem*, 2 Hurl. & C. 530, 531, per *Bramwell*, B.; *Aldridge v. Williams*, 3 How. 24; *State Tonnage Tax Cases*, 12 Wall. 217.

Just as it reads, the plain and only purport of this statute is to forbid pecuniary co-operation among federal officers and employes of inferior grade—numbering (we are told) nearly 100,000 citizens—for any political purpose whatsoever, national, state, municipal, or other. A political purpose I understand to be a design to effect the government, or some branch or department or subsidiary agency of it, in its administration, composition, or policy, whether by a change of men or of measures.

"All political power is inherent in the people;" *i. e.*, in the people within the limits of whose sovereignty, determined territorially, or otherwise, that power is to be exercised, and to which it pertains. In framing the federal constitution, the people delegated to the nation so much power as they judged sufficient—whether so in fact, or not, (92 U. S. 549,)—for the performance of its functions. The residue, with certain very important restrictions in their own behalf, they confided to the state governments. The boundary between the several

states is territorial; between each of them and the nation it is subjective; yet, to the judicial perception, it is as well defined "as if the line of division was traced by landmarks and monuments visible to the eye." 21 How. 516. Whatever arbitrary power may attempt or accomplish, legally the barrier between the two jurisdictions is impassable, although the same persons may be subject to both. The "political purposes" of each are to be declared, attained, or sought only by its people; and, until our frame of government is changed, the people of the United States can constitutionally entertain and execute no purpose unless it relate to a subject of national jurisdiction.

In his *Philosophy of Law*, §§ 17, 164, 169, etc., Broom states the primary test of criminality to be, whether or not the act in question is prejudicial to the public. It goes, without saying, that he means the public whose rights it affects. Except as the citizens are concerned in the execution of the few delegated powers, the United States have no public, outside the District and territories, etc. Elsewhere, and as to all other matters, the people are the state's public. This dual relation must be constantly borne in mind, in considering the extent of the power of national legislation. It is entirely ignored in this statute. Read *U. S. v. Cruikshank*, 92 U. S. 549-551. Thus, every citizen is held obedient to two sovereigns. One sovereignty, however, can command only as to a few highly important matters; as to everything else its laws should be silent or unheeded. As to those matters its injunctions are equally imperative to every citizen, whether holding official relation to it or not. True, there are some crimes which, as technically defined, none but an agent can commit; for instance, embezzlement, which in another would be larceny. Yet the jurisdictional element (*i. e.*, the misappropriation of government property) is the same in each case. Many similar instances might be cited.

The sum and substance of it all is, however, that the United States, properly, only defines and punishes, as criminal, such acts as affect the proper discharge of its own functions. Evidently the present law is not intended for any such purpose. Accepting the statements of its advocates, its end is the protection of the individual and not of the function. This is not "legitimate." This law has no tendency to facilitate the collection of revenue; the settlement or sale of public lands; the safety of the currency; the prompt and proper delivery of the mails, or adjustment of accounts; in short, any governmental purpose of the Union. It is purely personal in its design and

operation. If the giving and receiving of value for political purposes is arbitrarily forbidden, and not in order to protect the officer or employe, it is still more illegitimate, because it then loses all pretence of being in the interests of justice and freedom of action.

* * * * *

It is the province of the state to regulate the manner in which all property shall be acquired, held, used, and transferred within her borders, whether by deed, will, gift, or otherwise. 2 Kent, Comm. 437. There is as little right in the general government to regulate gifts within this state as there is to declare a general law as to making other contracts. Without the consent of New York, the United States cannot even accept for itself the gift of property lying within our jurisdiction, though to do so would directly tend to reduce the public debt, diminish taxation, aid the common defence, and promote the general welfare. *U. S. v. Fox*, 94 U. S. 315; 52 N. Y. 530.

* * * * *

Concede all the hardship upon the subordinate in office, and all the evils incident even to the "levying of political assessments," yet the penal legislation of the federal government cannot afford the remedy, although dismissal from service may be decreed. If the state of things assumed to exist, and against which this enactment is supposed to be directed, is *contra bonos mores*, yet we must remember the United States is not *ensor morum*, except to the extent mentioned.

In *Wynehamer v. People*, 13 N. Y. 386, *Comstock, J.*, quotes and italicizes this sentence from Blackstone: "*Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modelled by the municipal law.*"

The police power regulates "the intercourse of citizen with citizen." *Cooley*, Const. Lim. *572; 1 Dill. Mun. Corp. § 141; *Com. v. Alger*, 7 Cush. 82, 84, 86.

"In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of congress." *Cooley*, Const. Lim. 713 of last edition, citing *License Tax Cases*, 5 Wall. 471; *U. S. v. De Witt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 504; *U. S. v. Reese*, 92 U. S. 214; *Railroad v. Fuller*, 17 Wall. 568, top; *U. S. v. Cruikshank*, Id. 542; *Munn v. Illinois*, 94 U. S. 124, 125; *Railroad v. Husen*, 95 U. S. 470, 471; *U. S. v. Fox*, Id. 672; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, Id. 659; *People v. Draper*, 25

Barb. 374; S. C. on app. 15 N. Y. 562, 563; *Gibbons v. Ogden*, 9 Wheat. 203; *N. Y. v. Miln*, 11 Pet. 133-4, 139; *Slaughter-house Cases*, 16 Wall. 62, citing *Thorpe v. Railroad*, 27 Vt. 149. The state's reserved right to regulate the conduct (*inter sese*) of her citizens is of too vital importance to be argued away by forced construction or strained inference. "No interference by congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature," (5 Wall. 471, top;) *i. e.* "clearly incidental" to an express power; if not expressly given, (9 Wheat. 204, top.)

The assistant district attorney is made to say, in the speech attributed to him, that the power to pass this law is fairly deducible from that "to lay and collect taxes." How any more than from that to establish post-offices and post-roads, or any other of the 17 grants, is not stated, nor can I conjecture. Certainly it is not "strictly incidental" to taxation.

Of a much more plausible deduction, the United States supreme court declared, through its late chief justice: "This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly-adopted means for carrying into execution the power of laying and collecting taxes." *U. S. v. De Witt*, 9 Wall. 44. The statute there drawn in question was section 29 of the internal revenue act of March 2, 1867, c. 169, (14 St. 484,) punishing the sale of taxable oil inflammable at less than 110 deg. Fahrenheit. It was held to be a mere police regulation, not within congressional authority, and void. *Id.* A like statute by a state held constitutional, although the oil was made under a United States patent granted De Witt, exemption from such state legislation not being considered fairly deducible from the patent, or the power under which it issued. *Patterson v. Kentucky*, 97 U. S. 501, 503 *et seq.*, affirming *Patterson v. Com.* 11 Bush, 311; *Veazie v. Moore*, 14 How. 574, 575.

The right and duty of the state to guard its citizens from moral danger (and to determine its existence and cause) is the same as it is with regard to physical perils.

In addition to the numerous citations before given, decisions analogous to that cited from 97 U. S. 501 *et seq.* have repeatedly been announced both in the federal and state courts, under the prohibitory liquor laws of the states, and the United States laws imposing license fees or special taxes. *License Cases*, 5 How. 573-632; *Bartemeyer v. Iowa*, 18 Wall. 129-141.

Congress can prescribe a uniform rule of naturalization, but not for the conduct of a naturalized citizen. It can declare how he can become a citizen, but not his rights as a citizen. It cannot control his whole life because made a citizen under its legislation. Neither can it, upon like ground, control the ordinary acts of one holding a federal office. *Osborn v. U. S. Bank*, 9 Wheat. 827, 828.

The police power is one which the state cannot surrender. To permit it, would be to allow the legislature to give up the functions for the discharge of which the state exists. *Beer Co. v. Mass.* 97 U. S. 33, middle; *Boyd v. Alabama*, close of opinion, per *Field, J.*; 94 U. S. 650; *Met. Bd. v. Barrie*, 34 N. Y. 667, bottom, and 668, top.

However important the object, real or assumed, of this legislation, "yet it is equally important that there be no usurpation of jurisdiction." *U. S. v. Cahill*, 3 Crim. Law Mag. for March, 1882, 197, cited *infra*.

* * * * *

Of all matters pertaining to state affairs, "pending campaigns" and elections are those with which the general government has the least right to meddle, because they are the corner-stones of an independent, political organization.

Vindicating the fourth section of the first article of the Federal Constitution, Hamilton writes, with the emphasis of italics:

"Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.*" [He proceeds to add in a subsequent paragraph:] "Suppose an article had been introduced into the constitution empowering the United States *to regulate the elections for the particular states*; would any man have hesitated to condemn it, both *as an unwarrantable transposition of power*, and as a premeditated engine for the destruction of the state governments? The violation of principle, in this case, would have required no comment; and to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the state governments. An impartial view of the matter cannot fail to result in a conviction that *each*, as far as possible, *ought to depend on itself* for its own preservation." *Federalist*, No. 59.

"It is clear that no federal statute can interfere with voters except at an election for representatives in congress, and then only as to their protection in voting for representative in congress. Hence, it is essential to be charged in the indictment that, 'at an election for representative,' etc., the offence was committed; and it is not sufficient to allege that 'at an election at which a representative was voted for,' etc. It may be that the election in question

was for some other purpose over which the federal government had no control, and with which it had no right to interfere." *U. S. v. Cahill*, per *Treat*, J., in 3 *Crim. Law Mag.*, for March, 1882, pp. 196-198.

Interference with a "pending campaign" is obnoxious to the same objection as to meddling with a state election. Neither the United States nor any state can constitutionally pass such a law as this, because it violates natural right. Speaking of these rights, *Cooley*, J., says: "There are some things too plain to be written," even in a constitution. 24 Mich. 107, cited *infra*.

"Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." 2 *Webst. Works*, 392; 1 *Bl. Comm.* 124; 2 *Story, Life*, 278, letter to Dr. Lieber; *Calder v. Bull*, 3 *Dall.* 388, top; *Wilkinson v. Leland*, 2 *Pet.* 657.

In *Bartemeyer v. Iowa*, 18 *Wall.* 132, middle, *Miller, J.*, mentions, as existing outside of constitutions, those "general principles supposed to limit all legislative power." See, too, *Merrill v. Sherburne*, 1 *N. H.* 213, near top, per *Woodbury, J.*; *People v. Sup'rs*, 4 *Barb.* 74-5; *Benson v. Mayor*, 10 *Barb.* 244-5; *Powers v. Bergen*, 6 *N. Y.* 366-7; *Goshen v. Stonington*, 4 *Conn.* 225. Especially see *People v. Hurlburt*, 24 *Mich.* 107 *et seq.*, cited *supra*. Also, read *Lee v. State*, 26 *Ark.* 265 *et seq.*

Not only does this kind of legislation assail that entire freedom of political action which is the very fundamental idea of republican institutions,—upon which nation, states, and constitutions rest,—but it violates the spirit (and, indeed, the letter) of the declaration in the first amendment, that freedom of speech and of the press shall not be abridged. *U. S. Const. Amend. 1.* Look at the language of this amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; and the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Indubitably, it would be a violation of this provision for congress to enact that none of the 100,000 government officials should give anything to the Methodist church, (for instance,) though left free to hold such religious tenets as they pleased, and to preach and pray accordingly. The exercise of religion is not free unless every one can give of his means freely, without control, in its support, and to promulgate its doctrines. In like manner, freedom of speech and of the press is abridged if every citizen cannot, at will, contribute to

cause the speech to be made in a suitable place, and, when made, that it may be disseminated to accomplish the "political purposes" for which it is intended. Freedom of the press is not simply the right to print. It is, pre-eminently, the right to publish, which necessarily involves the right to receive aid from whomsoever has the means and desire to give, that the publication may be effected. So the right to assemble includes the right to hire Faneuil Hall, or any other convenient place, in which to hold the meeting, and the right of every citizen who makes one of that assembly, or chooses to aid its object, (political or other,) to give towards the hire of the hall and other expenses.

"The right to life includes the right of the individual to his body, in its completeness, and without dismemberment; the right to liberty, the right to exercise his faculties, and to follow a lawful avocation for the support of his life; the right of property, the right to acquire, possess, and enjoy it in any way consistent with the equal rights of others, and the just exactions and demands of the state." *Bertholf v. O'Reilly*, 74 N. Y. 515, middle, per *Andrew*, J.

A more severe blow at free discussion was never dealt than this law, which says of 100,000 citizens that they shall not give, at their own good pleasure, to have it carried on; and the deadly stroke is given in the name of political liberty, and under the banner of "reform!"

This law is void because it overthrows that equality of rights which belongs to every citizen. It sets a seal of inferiority upon a class, denying to all whom it embraces a privilege which every other person in this broad land possesses.

In terms, amendment 14 is restrictive upon the states, as the first nine were upon the United States; yet of these it was well said that they "are declaratory of the great principles of civil liberty, which can be infringed neither by national nor the state governments." *Campbell v. State*, 11 Ga. 353.

The United States was bound to respect the equal rights of the citizen before the late amendments were adopted.

In 1818 Levi Woodbury, who had recently taken his seat upon the bench of his native state, declared that "an act which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guarantied to every subject." *Merrill v. Sherburne*, 1 N. H. 212, cited *ante*.

Denying to a specified class the right to fish in the waters of the state is depriving that class of the equal protection of the laws. *In re Ah Chong*, 2 FED. REP. 737, *Sawyer*, C. J. See opinion of same able

judge, *In re Tiburcio Parrott*, 1 FED. REP. 481. In this last case those in which the "privileges and immunities" of citizens have been discussed are cited; especially the familiar passage from Mr. Justice Washington's opinion in *Corfield v. Coryell*, 4 Wash. C. C. 371, adopted in *Ward v. Maryland*, 12 Wall. 430, and in *The Slaughter-house Cases*, 16 Wall. 76.

Upon the next page the court say it was not the purpose of the fourteenth amendment to transfer the security and protection of all the civil rights mentioned from the states to the federal government. 16 Wall. 77. If not transferred for protection, they cannot be (as to 100,000 citizens) for the purposes of invasion and abridgment. Whatever rights citizens have, the fourteenth amendment says shall be shared equally, (Id;) and this statute does not comply with that requirement.

In his powerfully-reasoned dissenting opinion, *Field, J.*, asserts for every citizen "the right to pursue the ordinary avocations of life without other restraint than such as affect all others, and to enjoy equally with them the fruits of his labor." 16 Wall. 90, middle. "To enjoy equally" means to use just as unrestrainedly as every other citizen.

The same distinguished jurist, in his opinion in the *Queue Case*, as courageous as it is able, after referring to legislation against the Catholics, etc., says:

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment to the constitution." [Cited.] "The equality of protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that, in the administration of criminal justice, he shall suffer for his offences no greater or different punishment." *Ho Ah Kow v. Nunan*, 5 Sawy. 562.

I will add that he shall suffer no punishment for an act which in another is justifiable and commendable.

In another paragraph Judge Field observes:

"It is certainly something in which a citizen of the United States may feel a generous pride, that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them,

however humble, come from what quarter it may, is 'caught upon the broad shield of our blessed constitution and our equal laws.'" Id. 563.

"What government owes to society, and all it owes, is the impartial administration of equal and just laws." Sharswood, Prof. Ethics, 20.

In some instances, where the general terms of a law might seem to embrace an area beyond the legislative jurisdiction, the courts have narrowed the statute by construction to persons and things which might properly be made amenable to it. This was done with regard to the acts requiring stamps to be placed upon judicial process, and making unstamped instruments inadmissible in evidence. They were generally held applicable to federal tribunals; some holding they were not intended to apply to state courts, and others that congress could not extend them beyond the national courts. *Carpenter v. Snelling*, 97 Mass. 452, *Moore v. Quirk*, 105 Mass. p. 51, § 2; *People v. Gates*, 43 N. Y. 40.

In the before-cited case of *U. S. v. Cahill*, Treat, J., observed:

"It would hardly be contended that, because congress may pass a law to control congressional elections, and protect voters against unlawful or violent interference with the right to vote for congressional representatives, therefore, whatever occurred at an election which did not interfere with such a right must be considered within the terms of the act, because the words are general, viz.: 'Unlawfully prevents any qualified voter of any state * * * from freely exercising the right of suffrage,' etc. The language must necessarily be so construed as to confine the provisions of the statute within constitutional limits." 3 Crim. Law Mag. 197.

That cannot be done here—*First*, because the statute does not, like Rev. St. § 5511, under which the last-cited case arose, confine itself to "any election for representative or delegate to congress," nor, indeed, to an election at all; and, *second*, because the indictment does not allege the transaction to be with reference to such, or to any election or other subject-matter of federal jurisdiction.

Congress cannot say that certain officers and employes shall not give or receive any money or thing for "political purposes" generally, and leave the courts to construe it to mean "any federal purpose." If this were competent, the indictment does not allege nor the proof show anything of the kind. But it is not competent. It is not possible to separate the unconstitutional from the constitutional, if any part could be deemed so. 92 U. S. 221.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.

This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in the due course of legal proceedings must, annul its encroachments upon the reserved powers of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *U. S. v. Reese*, 92 U. S. 221.

"It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express." *U. S. v. Fox*, 95 U. S. 672-3.

The history of the times shows that the legislative power is constantly striving to overpass the bounds deliberately set to their authority; and that the people are compelled to place new barriers against evil legislation, and to call frequently upon the courts to see they are not scaled or overthrown. Commenting upon the report of the *Queue Case*, 18 Am. Law Reg. 676, Judge Cooley says: "It is a matter of every-day observation that legislatures are accustomed to treat constitutional limitations as imposing no moral obligation whatever upon their members;" and there is therefore a constant effort to evade rather than to observe them. 18 Am. Law Reg. 684.

Possibly Judge Cooley might (or might not) omit or soften his language if it were intended to appear in the Michigan Reports; but in the preface to the second edition of his work on Constitutional Limitations he uses the like. After remarking that his book was originally "written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government" * * * and "endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their state constitutions," he adds:

"Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints."

Another distinguished jurist writes:

"It is worth while to remark that in every new and amended state constitution the bill of rights spreads over a larger space; new as well as more stringent restrictions are placed upon legislation. There is no danger of this being

carried too far, as Chancellor Kent appears to have apprehended that it might be. There is not much danger of erring upon the side of too little law. The world is notoriously too much governed. Legislators almost invariably aim at accomplishing too much. Representative democracies, so far from being exempt from this vice, are, from their nature, peculiarly liable to it." Sharswood, *Prof. Ethics*, 22, 23.

In President Woolsey's edition (A. D. 1875) of Dr. Lieber's *Civil Liberty and Self-Government*, an editor's note to page 161 observes that "specific checks on legislative power are coming more and more into use. The people are beginning to distrust the legislatures, as they formerly did the executives." They should distrust *both*. "The price of liberty is eternal vigilance."

The argument was heard by WALLACE, C. J., BENEDICT, D. J., and ADDISON BROWN, D. J.

WALLACE, C. J. While we have not overlooked the several rulings upon the trial which are impugned by the defendant, our principal attention has been directed to the point most strenuously pressed upon the argument relating to the constitutionality of the act of March 15, 1876, upon which the indictment proceeds. The act prohibits "all executive officers or employes of the United States not appointed by the president, with the advice and consent of the senate," from "requesting, giving to, or receiving from, any other officer or employe of the government any money or property or other thing of value for political purposes." We cannot profess to be ignorant that this law was enacted in order to interdict practices which had become a topic of extended animadversion. But, although it may have been aimed at the suppression of the practice which has prevailed among party organizations of soliciting contributions for party purposes from their office-holding members, or exacting them by a moral coercion; and although its provisions may be well calculated to effect this object,—it does not follow that it can be sustained as a legitimate means to that end. No person can be indicted under it for any other act than the one precisely designated. Whatever may have been the attendant circumstances, and however they may have qualified the moral complexion of the transaction, the person indicted can only be tried for doing the thing which the statute prohibits; and unless this of itself, isolated from all its concomitants, can be competently made a crime by congress, the statute is nugatory.

It is insisted for the defendant that it is not within the constitutional power of congress to make the giving or requesting or receiving of a voluntary contribution for political purposes by a subordinate

government official a criminal offence. It will be observed, however, that the prohibition applies only when there is concerted action between officials in this behalf. The question, then, is whether it is competent for congress to prohibit co-operation between officials in the raising of funds for political purposes. Undoubtedly, it is lawful for congress to prescribe all needful regulations for the discipline of government officials, and to declare what infractions of discipline shall be treated as criminal offences. The power to prohibit acts of officers or employes which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essential to promote the end and object of government; and this power resides in the legislative department of the government. In executing this power congress must of necessity exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency. This legislative discretion embraces a large field, and its boundaries cannot always be readily located. It is only when congress has palpably transgressed the limits of its discretion that the judicial department will intervene. Such a case might arise if congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character. We cannot affirm that congress transcended its discretion in prohibiting transactions between officials which create the relation of donor and donee, and introduce party interests into the public service; nor that congress erred in assuming that the influences springing from this relation and these interests should be discouraged as liable to deflect the independence and impartiality which must rule official intercourse. Many instances may be found in the laws of congress where this legislative discretion has been exercised. It suffices to refer to one contained in the act of February 1, 1870, which prohibits any officer or clerk in the employ of the government from making any gift or present to an official superior. It is not necessary to maintain that the co-operation of officials in raising funds for political objects is essentially demoralizing to the public service, or subversive of discipline. It is sufficient to justify the exercise of the legislative discretion if the prohibited acts tend to introduce interests which disturb the just equipoise of official relations. If it is suggested that it is the right and duty of every good citizen to aid in promoting such political objects as he deems to be

wise and beneficial, and that congress has no constitutional power to abridge that right, the answer is that no citizen is required to hold a public office, and if he is unwilling to do so upon such conditions as are prescribed by that department of the government which creates the office, fixes its tenure, and regulates its incidents, it is his duty to resign.

In reaching the conclusion that the statute is not obnoxious to the objections which have been suggested, we have given force to the presumption in favor of its constitutionality which it is the duty of the judiciary to apply to all legislative enactments. This presumption should prevail in all conflicts of interpretation and all doubtful implications of constitutional power, so as, if possible, to sustain the validity of legislative action. We have examined the minor points raised upon the argument and presented in the brief of counsel relating to the rulings upon the trial, but do not deem it necessary to discuss them. We think them to be without merit.

The motion in arrest of judgment and for a new trial is denied.

UNITED STATES *v.* LISSNER.

SAME *v.* SAME.

Circuit Court, D. Massachusetts. July 26, 1882.)

COUNTERFEITING—MUTILATING COINS.

Where a coin which had been regularly coined at the mint was afterwards punched and mutilated, and an appreciable amount of silver removed from it, and the hole plugged up with base metal, or with any substance other than silver, it is an act of counterfeiting; but it is otherwise where the hole was punched with a sharp instrument, leaving all the silver in the coin, though crowding it into a different shape.

The United States Attorney, for plaintiff.

Geo. F. Verry and T. J. Morrison, for defendant.

Before GRAY and LOWELL, JJ.

LOWELL, C. J. The defendant was convicted upon two indictments charging him with passing counterfeit silver coins of the denomination of quarter dollars and half dollars, knowing them to be counterfeit. The coins in question had had small holes made in them, and these holes had been filled with some base metal and passed by the defendant, with knowledge of their condition. Some of the holes had

been punched with a sharp instrument, involving no loss of silver; others were made by drilling out a part of the silver, though not with any intention of using the silver drilled out. Silver coins with small holes made in them are not fully current, some persons refusing and others accepting them. We understand that the defendant bought the coins at a slight discount and passed them for their nominal value. He probably did not consider himself guilty of passing counterfeit money; but he was guilty of doing an act which the law is to characterize. The point was a new one, and the learned judge, having much doubt upon it, ruled, for the purposes of the trial, that a coin which had been regularly coined at the mint, and afterwards punched or mutilated, and thereafter restored to the similitude of a genuine coin by the insertion of any metal, (meaning base metal,) was counterfeit. To this ruling an exception was taken.

Silver coins of the denominations of quarter dollars and half dollars are required to be made of a certain weight and fineness, and are lawful tender in payment of debts to the amount of \$10, (Rev. St. §§ 3513, 3586; St. June 9, 1879, c. 3; 21 St. 7;) and are to be received by the treasury in exchange for lawful money in sums of \$20, or any multiple thereof, (St. June 9, 1879, c. 12, § 1; 21 St. 7.)

In the case of gold coins the law is that when reduced in weight below the standard they are a good tender at a proportionate valuation. Rev. St. § 3585. We find no such provision made for silver coins. If such a coin has had an appreciable amount of silver removed from it, we cannot say that it remains a good coin for its original value, or even for a proportionate value. If, then, the hole is plugged with base metal, or with any substance other than silver, this act is an act of counterfeiting, because it is making something appear to be a good coin for its apparent value which was not so before.

In the English case, *Reg. v. Hermann*, Law Rep. 4 Q. B. D. 284, cited by the United States, a gold coin had been filed away until the milling was destroyed, and then a new milling had been made. A majority of the court held that this coin was counterfeit. Two able judges dissented, but one of them said that if any base metal had been added to the coin to make up the weight, he should not have doubted that it was counterfeit. If that case had been like this, there would, we suppose, have been no dissent. We do not doubt that the judgment of the court was sound, because the milling was actually a counterfeited milling.

The fraudulent alteration of a bank-note to make it appear of more than its true value, and other similar acts which are held to be forgery, are analogous.

We are therefore of opinion that the ruling and conviction were proper in respect to those coins which had been drilled and afterwards filled up.

On the other hand, we do not consider it a criminal act, whatever the intent may have been, to add base metal to a good coin, and we see no ground for holding that a hole punched through a coin with a sharp instrument, crowding the silver into a slightly different shape, but leaving it all in the coin, has any effect to render it less valuable or less lawful tender than before. The statutes above cited are silent upon this exact question; but we think it clear that a silver coin, duly issued from the mint, remains of full value so long as it retains all the appearance of a coin, and does besides contain all its original weight and fineness. This being so, we cannot regard the addition of something to it as a criminal act of counterfeiting. Passing such a coin works no injury to the person to whom it is passed.

The pleadings and evidence reported do not enable us to discriminate between the counts which apply to the one and to the other kind of alteration. We must, therefore, order new trials. Counsel will probably be able to arrange for a default upon such count or counts as relate to what we hold to be counterfeited coin.

Verdict set aside.

FISHER v. MEYER and others.

(Circuit Court, S. D. New York. May 20, 1882.)

CONSPIRACY—ACTION FOR DAMAGES—VERDICT.

The verdict of the jury, on a trial in a civil action for damages, will be regarded, on motion to set it aside, as an affirmative finding upon the issues which were presented for their determination. So, where the verdict was for a large amount against two of the defendants, and for but nominal damages against the third defendant, such defendant is not injured by the finding of nominal damages against him, and cannot have the verdict set aside even though it was inconsistent with the charge of the court.

W. G. Willson, for plaintiff.

Joseph H. Choate, for defendant.

SHIPMAN, D. J. This is a civil action to recover damages for a conspiracy. The jury returned a verdict in favor of the plaintiff for

a large sum against two of the defendants, and for \$100 against the defendant R. S. Newcomb. He now moves to set aside the verdict against him upon the ground that it is an illogical and inconsistent verdict; that it shows, and the fact was, that the jury did not find that the allegations of the complaint in regard to him were true, for if they had found that he committed the acts charged in the complaint they were bound, under the charge of the court, to render a verdict for a very large sum.

I think that I am obliged to regard the verdict of the jury for the plaintiff as an affirmative finding upon the issues which were presented for their determination. If it is permitted either to assume or to prove that the jury did not find what the verdict says they did find, the result of trials by jury will be thrown into great confusion. Starting from the position that the jury meant to find the issues for the plaintiff, and not merely that a certain sum of money should be paid to him without regard to the cause of action which was set forth in the complaint, it is true that the verdict against Mr. Newcomb was an inconsistent one, because, under the charge of the court, if he committed the acts charged in the complaint, he was liable in a much larger sum than the jury gave. If the plaintiff had moved to set aside the verdict as against Mr. Newcomb, a serious question would have been presented, for it is manifest that the verdict was not, in its amount, in accordance with the charge. But if the plaintiff is satisfied with the verdict, I do not think that it should be set aside upon the motion of the defendant. He is not injured by the fact that it was for nominal damages, when it should have been for a very large sum if the jury found the issue against him, and it is not permitted to me to infer that the verdict was not an affirmative finding upon the issues which were presented.

The motion is denied.

HUNTOON and others v. TRUMBULL and others.

(Circuit Court, W. D. Missouri, W. D. October, 1880.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS OF FACT.

In an action for damages for personal injuries inflicted by being thrown from a buggy attached to a runaway horse, alleged to have been frightened by new and unusual machinery being exhibited on the public street, on the question of negligence of defendants—whether the machinery was kept in the proper place, and in the proper manner, and with due care or otherwise; and whether the machinery, or the smoke or steam issuing therefrom, and nothing else, caused the fright of the horse or not; and on the question of contributory negligence on the part of the plaintiffs—whether the horse was managed with care and prudence, or otherwise; and whether the horse was vicious, and contributed to the accident, or was dangerous in the sense of being disposed to run away,—are questions of fact for the jury to determine from the evidence.

2. SAME—LIVERY-STABLE KEEPERS—OBLIGATIONS.

A livery man is bound to keep safe horses, or fully disclose the character of the horse to the driver at the time of letting him, and may be responsible for wrongful acts in this particular.

3. SAME—DAMAGES.

Where a husband sues for damages for injuries to his wife by being thrown from a buggy in which he was driver, if the injury resulted from the wrongful act of defendants and from no other cause, and the plaintiffs have not contributed by their own acts or neglect, and the accident was not caused by the character of the horse, the defendants are liable in damages.

KREKEL, D. J., (*charging jury*.) The evidence in this case shows that the firm of Trumbull, Reynolds & Allen were on the fourth day of July, 1879, trading in agricultural machinery, having their place of business on the east side of Walnut, between Fourth and Fifth streets, in Kansas City; that for a number of years, in the course of their business, they had placed and kept standing on the opposite side of the street from their stores a number of machines, among them separators and a traction-engine; that on said fourth day of July they took out a traction-engine from Kansas City to the fair grounds for exhibition. When the engine was taken back in the early part of the afternoon of the 4th, it was left on the opposite side of the street from their store, in a gutter or ditch designating the limit of the street; the evidence showing the place and manner in which it was left. Huntoon and wife, (the plaintiffs,) residents of Wyandotte, Kansas, on the said fourth of July came with their family to Kansas City; Mr. Huntoon, wife, and child riding in a buggy, and the two boys in a street car. While going up Main street they saw the traction-engine on Walnut street. After going up Main street, they crossed over to Walnut, passed up Walnut some distance, turned

and came back or down Walnut street, one of the boys walking, while the other two children were with their father and mother riding in the buggy. They thus proceeded down Walnut street, and somewhere near Fifth or south of Fifth the horse ran away, upset the buggy, and threw out the occupants, and it is claimed Mrs. Huntoon was permanently injured by the fall. The first and most important question you are called upon to decide, under the state of facts in evidence, is, was this act of defendants, in placing the separators and the engine in the condition the evidence shows the same to have been, a wrongful and negligent act, and whether in consequence of this claimed wrong and neglect the injury complained of resulted to plaintiff? If the act of the defendants was not wrongful and negligent, the defendants are not liable. But not only must the act of leaving the machinery as shown by the evidence be wrongful and negligent, but such wrong and neglect must have been the cause of the injury complained of. If the injury to plaintiff was not caused by the wrongful and negligent acts of defendants, plaintiff cannot recover in this action. In order to arrive at a proper conclusion as to whether the leaving of the separators and the engine as they were left, were wrongful and negligent acts on the part of the defendants, you will, in the first place, consider the machinery so left, its appearance, as well as the necessity, if any, of exhibiting such machinery in the usual course of trade as the means of examination. Not every new invention in machinery is prohibited from being shown in proper places, in proper condition, and at proper times, because either men or animals may become frightened at the unusual sight. The question for you to determine is, were the separators and engine kept in a proper place where they were kept, and was the engine kept as prudence and due regard for safety of life and property would dictate it to be kept? In order to determine this, you may take into consideration the manner and place in which machinery of the kind referred to had been kept by the defendants in the past—the fact that no regulation, so far as shown, prohibits such keeping in Kansas City in the places where the same were kept; not that such want of regulation justifies any wrongful or negligent keeping, but as bearing upon the general question of proper care.

Separators and traction-engines had become articles of common use, and properly kept cannot be complained of because a horse may become frightened on account of them.

If, upon full consideration of the evidence in this case, you shall come to the conclusion that no wrongful action or negligence was com-

mitted by defendants in keeping the separator and engine in the place where the same were kept, and in the manner in which they were kept, as shown by the evidence, you should find for the defendants. But in case you shall not find this issue for the defendants, but find that they committed a wrong, and are guilty of neglect in having kept the machinery in the place and in the manner in which the same were kept, then you should determine whether the wrongful and negligent act of the defendants caused the injury by the plaintiff complained of. All the testimony bearing on this question should be examined by you, and in so doing you should carefully consider as to whether a horse is likely to become frightened at objects such as the machines described by the testimony. You should be satisfied from the testimony that the horse became frightened at the machines, smoke or steam issuing from the engine, if any, and at nothing else, and that such fright caused the running away. You should also be satisfied from the evidence that the horse was managed with ordinary care and prudence; that the individual managing him had not deprived himself by his own acts from a proper management of the horse. And here you may take into consideration, in connection with the rest of the testimony, the fact that four persons were in the buggy at the time the accident occurred. Regarding the character of the horse, you are instructed that if you are satisfied from the evidence that he was dangerous in the sense of being disposed to run away, that fact must be considered with the rest of the testimony in arriving at the cause of the runaway. The knowledge regarding the disposition of the horse by Mr. Huntoon is the knowledge of the wife. If the plaintiff Huntoon or his wife knew nothing of the vicious character of the horse, and yet you are satisfied from the testimony that the horse was vicious, and that, being so, caused or actually contributed to the runaway and consequent injury, you should find for the defendants. The defendants cannot be charged with the consequences of the wrongful act in allowing an unsafe horse to be hitched up, for that would be making them liable for the wrongful act of another. There may be a responsibility in such case, but that responsibility is not upon the defendants. A livery man is bound to keep safe horses, or fully disclose the character of the horse to the driver at the time of letting him, and he may be responsible for wrongful acts in this particular.

As already stated, you are to consider the character of the horse as shown by the evidence, along with the rest of the testimony, in order to arrive at the cause which contributed to the runaway and

accident. The suit is for permanent injury to the wife. The loss of service of the wife, the nursing and expense of nursing, and the doctors' bills, are subjects of another suit brought by the husband on his own account, and you have nothing to do with damages which may have thus arisen. It is the permanent injury to the wife which is in controversy. If such has resulted from the wrongful act of the defendants, and from no other cause, and the plaintiffs have not contributed by their own acts or neglect, or caused by the character of the horse, you are to find for the plaintiff, and estimate her damages, if any.

DUNMEAD v. AMERICAN MINING & SMELTING CO.

(Circuit Court, D. Colorado. July 22, 1882.)

NEGLIGENCE—FELLOW-WORKMAN.

In an action for damages for personal injuries caused by the negligent acts of a fellow-workman, plaintiff must aver that he himself exercised due care and caution at the time of the accident, and that he was not informed and had no means of knowledge of the character of the person who was employed with him, or of his capacity and fitness for the work.

T. A. Green and W. W. Cover, for plaintiff.

Markham, Patterson & Thomas, for defendant.

HALLETT, D. J., (orally.) Case No. 900 is an action to recover damages for injuries received by the plaintiff from the overturning of a slag-pot. Plaintiff avers that he was in the service of defendant in the month of July of last year, and that he was engaged in removing slag-pots from the defendant's furnaces, to be emptied outside of the furnace building; that through the carelessness of another person, also employed by the defendant to assist in removing these pots, one of the pots was left in a place where it obstructed the passageway, and the plaintiff moving backwards, drawing a slag-pot without the building, fell upon this, or it caused him to fall down, and, as I understand it, the slag-pot which he was attempting to remove was overturned in such a way that it injured his person. He claims that this other man who was employed by the defendant with him was a careless and negligent person, who was not fitted for the service in which he was employed, and that the defendant knew that he was a person of that character; that he was a man of intemperate habits, and had been so in the discharge of his duties before that time, as the defendant knew.

The plaintiff omits to say in his complaint that he himself used due care and caution at the time of this accident. That, I think, is a matter which must appear upon the evidence. While it may be that he is not required to offer any evidence directly to the point that he was in the exercise of care and caution at the time of the accident, it must appear from all the evidence that the fact was so; that is to say, that he himself was not negligent. He fails to aver, also, that he was not informed of the character of this person who was employed with him. He says nothing upon that subject. He avers that the defendant had information of the unskilfulness and untrustworthiness of this man, but says nothing as to himself. It must appear from the evidence that he was ignorant of the character of this person, because if he knew of his character, knew that he was a person who was unfitted for the service, or had the same means of knowledge as the defendant, it was in his own wrong that he continued in service with such person, unless, indeed, there were some special circumstances, as that complaint had been made and the defendant had promised to dismiss this individual and employ another in his stead; but nothing of that kind is averred. He says nothing whatever as to his own knowledge of the capacity and fitness of this person, who was certainly employed with him in the precise service which the plaintiff was engaged in. He says nothing whatever as to his capacity and fitness. He should state something upon that point, as to whether he was informed that this person was unfit for the service in which he was engaged.

On these grounds the demurrer will be sustained.

CHARITON COUNTY.

(Circuit Court, W. D. Missouri. November, 1880.)

MUNICIPAL BONDS—RIGHTS OF BONA FIDE HOLDER.

Where the charter of a railroad company granted to it the privilege to obtain county subscription to its stock, and the defendant county subscribed for stock in the company, and issued bonds under the authority conferred by the charter of the company, such bonds are valid in the hands of innocent holders, notwithstanding there was, at the time of the subscription and issuance of the bonds, a special statute prohibiting the county court from taking stock unless the subscription was voted for by a majority of all the resident tax-payers. The issuing of the bonds raises the presumption that all preliminaries, including the election required, have been complied with, and the *bona fide* holder is not bound to look behind the question of power.

Henderson & Shields, for plaintiff.

C. W. Bell and C. L. Dobson, for defendant.

KREKEL, D. J. The legislature of Missouri, on the twentieth day of February, 1865, granted a charter to the Mississippi Railroad Company, to which defendant county in 1869 issued bonds in payment of a subscription of stock made thereto. This suit is brought on due and unpaid coupons of said bonds. The bonds issued are made payable to said railroad company or bearer. It appears that at the time of granting the charter and at the time of issuing the bonds there existed a special act, applicable to the defendant county, providing that whenever the county of Chariton wishes to subscribe to the capital stock of any railroad company the county court shall cause an election to be held, and if a majority of all the resident tax-payers of said county shall vote for the subscription, the county court shall subscribe. The county court is prohibited by the act from taking stock unless the subscription was voted for by a majority of all the resident tax-payers.

It is claimed that because the proceedings which led to the subscription and issuing of the bonds were not had under this special act, but under the provisions of the charter, the bonds are therefore void for the want of power in the county court to make the subscription and issue the bonds. The bonds on their face recite that they were issued under the authority conferred by the charter of the company. The question whether this special act of March 12, 1859, relating to defendant county, was in force at the time of the issuing of the bonds, I shall not stop to discuss, holding that, even if it was in force, it does not affect the legality of these bonds. The charter of the Mississippi Railroad Company granted to it the privilege to obtain county subscription, and the defendant county could avail itself of the opportunity to subscribe either under this power or the power granted by the special act, assuming that the latter was in force. It can scarcely be doubted that the legislature of Missouri had the power to except this railroad company out of any limitation which might have existed by virtue of the special act. Aside from all this, it has been held that the issuing of the bonds raises the presumption that all preliminaries, including the election required, have been complied with, and a *bona fide* holder is not bound to look beyond the question of power. *City of Lexington v. Butler*, 14 Wall. 283; *Flagg v. Palmyra*, 33 Mo. 440. There is an abundance of power, as claimed by either party, to issue bonds. The recital in the bonds that they were

issued under authority granted by the charter might be erroneous, yet, if the special act authorized the issuing of them, that is sufficient. The question is, did power exist? Whether the source thereof was correctly pointed out can make no difference. But it is said that the provisions of the special act define who shall vote, and that these have not been complied with. The answer is that the tribunal, the county court, was by law made the judge of such matters, and when they issued the bonds innocent holders had a right to presume that all preliminary requirements had been complied with. The objections urged against the validity of the bonds are not that there was no power to issue them, but that no power existed under the charter, because the special act limits the power there granted. The defendant county urging this objection can only do so on the assumption that the special act is in force. If so, there existed power to issue the bonds; and the same having been issued, the law will attribute the exercise of the authority to the true source in the furtherance of justice and good faith. Eight years of interest have been paid on these bonds, thus affirming their validity and curing irregularities, so far as such acts tend in that direction. The law of the case arising upon the facts is with the plaintiff, and judgment accordingly.

LAWRENCE, Jr., and another v. MORRISANIA STEAM-BOAT CO.

(Circuit Court, E. D. New York. July 19, 1882.)

1. CONTRACT BY LETTER — ACCEPTANCE OF PROPOSITION — ORAL STATEMENTS MERGED.

Where libellants made an offer by letter to the respondents to alter and repair one of its steam-boats and "to build out the frames as we have talked of," which offer was accepted by letter on the part of the respondents, such letters constituted a written contract, and all prior conversations and statements were merged in it.

2. SAME — STATEMENTS NOT GUARANTIES.

Statements made in advance of the acceptance of a proposition by letter, of what it was thought would be the result of a given plan, are not guaranties of of such result.

3. SAME — PAYMENT — TAKING NOTE, EFFECT OF.

Where, by the written contract, payment was to be made in "cash or its equivalent" the taking of a note for the balance due on the performance of the contract, is not a waiver of the right to sue for the balance due; such taking of the note operates merely as a giving of credit.

G. A. Black, for libellants.

T. C. Cronin, for respondent.

BLATCHFORD, Justice. The contract of the parties, as contained in the two letters, contained no warranty by the libellants that the alterations to be made would remedy the defects. The entire contract is contained in those two letters. All prior conversations and statements and negotiations were merged in the written contract. The expression "to build out the frames as we have talked of" can refer only to the conversation between Longstreet and the libellants. Longstreet testifies that the libellants did what they agreed should be done. They built out the frames to the extent that they and Longstreet thought necessary. They and Longstreet were disappointed in the result. Besides, the new testimony in this court shows that the letter of the libellants to Longstreet was brought before the board; that Longstreet was called in, and stated the proposed method of alteration, and what it was thought its effect would be; and that then the board authorized Mr. White to accept the proposition of the libellants. Stating in advance what it is thought will be the result of a given plan and guarantying such result are two different things. The libellants carefully avoided making any such special contract as is set up in the answer. There was never any waiver of any right to bring this suit. By the written contract the payment was to be made in "cash or its equivalent." Taking the note was no such waiver. The non-payment of the note remitted the libellants to all their rights, and caused the taking of the note to operate merely as a giving of credit. If the respondent desires, the decree may direct the surrender of the note. The libellants are entitled to a decree for \$1,204.88, with interest at 6 per cent. per annum from November 20, 1880, and their costs in the district court, taxed at \$103.36, and their costs in this court, to be taxed.

See same parties, 9 FED. REP. 208.

UNITED STATES *v.* TRAIN and others.*(Circuit Court, D. Massachusetts. July 26. 1882.)*

1. PRACTICE AND PROCEDURE—SECTION 914, REV. ST.

Section 914 of the Revised Statutes, providing that the practice and procedure in the United States courts shall conform as near as may be to the practice and procedure existing at the time in like causes in the courts of record of the state within which such courts are held, does not extend to the means of enforcing or revising a decision once made.

2. SAME—PROCEEDINGS AFTER TRIAL.

The object of this section was to assimilate the form and manner of presenting claims and defences in the preparation for and trial of suits to those prevailing in the state courts, and does not include statutes requiring instructions to be in writing, or permitting instructions and certain papers to be taken by the jury when they retire, or requiring the jury to be directed to find specially upon particular questions of fact, nor to the manner or time of taking a case from one federal court to another by writ of error, bill of exceptions, or appeal.

P. Cummings and *Geo. P. Sanger*, for the United States.

J. O. Teele, for defendant.

Before GRAY and LOWELL, JJ.

GRAY, Justice. This is a motion to dismiss a writ of error sued out of the United States to reverse a judgment of the district court in favor of the defendants in error in an action at law brought against them as sureties on the bond of a paymaster in the navy.

The case was tried in the district court at October term, 1880. The verdict for the defendants was returned on the twelfth of January, 1881, the term ended on the fourteenth of March, 1881, and the case was continued to the next term, at which, on the ninth of April, a bill of exceptions was filed by the United States, which the parties, by stipulation in writing, agreed should have the same force and effect as if it had been filed on the last day of the term at which the verdict was rendered, and which was afterwards allowed by the district judge and ordered to be filed as of the date of the verdict before the jury left the bar.

The ground of the motion to dismiss is that the bill of exceptions was not filed within three days after the verdict, or within such further time, not exceeding five days, unless by consent of the adverse party, as the judge might allow, in accordance with the rule prescribed by the statutes of Massachusetts in the case of exceptions to the rulings of a judge of the supreme judicial court, or of the superior court. Mass. Gen. St. c. 115, § 7; Mass. Pub. St. c. 153, § 8; *Com. v. Greenlaw*, 119 Mass. 208.

The defendants rely upon section 914 of the Revised Statutes, re-enacting the fifth section of the act of congress of June 1, 1872, c. 255, and providing that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

But the context of the act, and the judgments of the supreme court, show that this provision is not to be understood in the broadest sense, nor as extending to the means of enforcing or revising a decision once made.

That this section does not extend to proceedings after judgment appears by the very next section, making special and peculiar provisions as to attachment, execution, or other process against a defendant's property, and borrowing from the laws of the state those remedies only which already exist, or which may be adopted by rule of the federal courts.

The object of the former section was to assimilate the form and manner in which the parties should present their claims and defences, in the preparation for and trial of suits in the federal courts, to those prevailing in the courts of the state. It does not include state statutes requiring instructions to the jury to be reduced to writing; or permitting such instructions and certain papers read in evidence to be taken by the jury when they retire; or requiring the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues. *Nudd v. Burrows*, 91 U. S. 426; *Sawin v. Kenny*, 93 U. S. 289; *Indianapolis & St. L. R. R. v. Horst*, Id. 291; *West v. Smith*, 101 U. S. 263. It does not apply to motions for a new trial, nor, whatever rule may be prescribed by the statutes of the state upon that subject, does it control or affect the power of the federal courts under the judiciary act of September 24, 1879, c. 20, § 17, and under section 726 of the Revised Statutes, to grant or refuse a new trial at their discretion. *Indianapolis & St. L. R. R. v. Horst*, above cited; *Newcomb v. Wood*, 97 U. S. 581.

The reasons are yet stronger against construing it as subjecting to the provisions of state statutes the manner or the time of taking a case from one federal court to another by writ of error, bill of exceptions, or appeal. These matters are regulated exclusively by the acts of congress, or, when those are silent, by rules derived from the

common law, from ancient English statutes, or from the practice of the courts of the United States. Congress has provided that a writ of error from this court to the district court shall be sued out within one year from the judgment below. Rev. St. § 635. And the only regulation that it has made as to bills of exceptions is that contained in section 953 of the Revised Statutes, re-enacting the fourth section of the act of 1872, and providing that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal.

The bill of exceptions might therefore be allowed by the judge at any time during the term at which the verdict was rendered. *Muller v. Ehlers*, 91 U. S. 249; *Hunnicut v. Peyton*, 102 U. S. 333. And the parties having agreed that it should be treated as if filed on the last day of that term, the motion to dismiss must be denied.

See *Perry v. Meehan. Mut. Ins. Co.* 10 FED. REP. 479; *U. S. v. Griswold*, *Id.* 810; *Castro v. De Uriarte*, 12 FED. REP. 250, and note, 259.

DAVIES and others, Adm'rs, v. LATHROP, Receiver, etc.

(Circuit Court. S. D. New York. July 12, 1882.)

BILL OF EXCEPTIONS.

Requisite for review of points brought up.

On Motion for New Trial.

WALLACE, C. J. The plaintiffs' motion for a new trial is dismissed.

The other branch of the motion will not be considered until a bill of exceptions is prepared and presented for settlement.

See S. C. ante, 353.

HYMAN v. CHALES and others.

HOPKINS and another v. CHALES and others.

(Circuit Court, D. Colorado. July 22, 1882.)

MARSHAL—SPECIAL DEPUTIES—OFFICER DE FACTO.

Where, under the laws of the state, a sheriff may appoint a person to perform a special service, a marshal, under section 788 of the Revised Statutes, has the same authority, and the person so appointed by him is an officer *de facto*, and a person served with process by such appointee cannot dispute his authority on the ground that he had not taken the oath of office, as required by the statute in relation to the appointment of deputies.

On Motion to Quash Marshal's Return.

HALLETT, D. J. In the case of Hyman against Chales and others, and Hopkins and another against Chales and others, defendants move to quash the marshal's return to the summons on the ground that the person who served the summons was specially appointed a deputy to serve it, and that it does not appear that such person had taken the oath of office as required by the statute in relation to the appointment of deputies.

Section 788 of the Revised Statutes provides that marshals and their deputies shall have the same power in executing the laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof. It appears that under the laws of the state a sheriff may appoint a person to perform a special service, such as serving a particular writ, and no reason is perceived for saying that a marshal under this section may not have the same authority. Upon general principles, however, if the marshal may appoint deputies to perform all services, he may appoint one to perform a particular service; and whether that person has taken the oath of office as prescribed is not a question for the person who may be affected by the duty to be performed. It may be a question which can be raised by the marshal himself as to whether the deputy is properly in his place, but as to the service which he has to perform he is an officer *de facto*, if no more. It does not lie with the person who may be summoned to dispute his authority, for that reason.

SMITH and others v. CRAFT and others.*

(Circuit Court, D. Indiana. July 27, 1882.)

1. PREFERENCE—RIGHT OF INSOLVENT DEBTOR TO MAKE, AND HOW IT MAY BE MADE.

An insolvent debtor, in the absence of the bankrupt law, has the absolute control of his unencumbered property, and he may prefer one creditor to the exclusion of all others. The favored creditor's debt may or may not be due, and the preference may be by a judgment, a mortgage, a deed, a transfer of securities, or choses in action, the sale of personal property, or the payment of money.

2. SAME—CONDITIONS AND LIMITATIONS AS TO THE RIGHT.

While the motive which prompts the debtor to make the preference is *not* material, the transfer, to be valid, must be in good faith, and in payment of an honest debt; the debtor cannot make a preference on such terms as he pleases. The preference must be absolute and unconditional, and without designs to secure to the debtor any personal benefit as against his non-preferred creditors, or to hinder or delay them in the collection of their debts. Equity favors an equal distribution of a debtor's property among all his creditors, and conditional preferences will not be sustained; *e. g.*, where the preference is the transfer of an entire stock of goods to a single creditor, conditioned on the employment of the debtor, by the preferred creditor, at a fixed monthly salary, as the creditor's agent and superintendent in continuing and carrying on the business formerly conducted by the debtor for himself, *it is invalid* because of such condition.

Horace Speed, for complainants.

Rand & Taylor and Baker, Hord & Hendricks, for respondents.

GRESHAM, D. J. The defendant Craft, who was a merchant at Indianapolis, on the fifth of April, 1879, executed to his co-defendant, Churchman, in trust for Fletcher & Churchman, a bill of sale embracing his entire stock of watches, diamonds, jewelry and fixtures; also a lease upon the building in which he had carried on his business, one year of the term not having then expired. This was all the property that Craft owned, except his notes and accounts, which he estimated to be worth \$1,000, and some real estate, which was encumbered for as much as it was worth. Fletcher & Churchman were bankers, and as such at different times had loaned money to Craft, on his agreement that if they would make the loans, and anything occurred by which he was unable to pay all his creditors, he would first pay or secure them. It is recited in the bill of sale that Craft is indebted to the bank in about the sum of \$31,000, and that the sale is made in payment and satisfaction of this indebtedness, "and the further consideration that said Churchman shall em-

*Reported by Charles H. McCarer, Asst. U. S. Atty.

ploy said Craft in said business, at the rate of \$150 per month, so long as said Churchman shall carry on or continue said business."

Immediately after the execution of this instrument, Craft's employes were notified by Churchman and Craft of the sale, and that thereafter the business would be carried on by Craft as the agent of Fletcher & Churchman. After this change, Craft conducted the business as agent, with his old force of employes, just as before the transfer, until some time in August, when, by direction of Fletcher & Churchman, he commenced selling the remainder of the goods at auction, and in this way the stock was finally disposed of some time in October. During the time that Craft managed the business he paid himself and his co-employes weekly out of the proceeds.

The complainants, the Middleton Plate Company, Keller & Untermeier, William Smith & Co., and Freund & Co., are eastern merchants and manufacturers, with whom Craft had been dealing for many years, and to whom he was indebted for goods purchased prior to the sale to Fletcher & Churchman. After the sale, and before the commencement of this suit, on the twenty-seventh of June, 1881, the complainants obtained judgments against Craft for the amounts respectively due them, upon which executions issued and returns were made of no property.

The bill charges that the goods which the complainants sold to Craft on time, and for which their several judgments were taken, were part of the stock sold to Fletcher & Churchman; that they divided the proceeds with Craft, and that the transfer was intended by both Craft and Fletcher & Churchman to hinder and delay the complainants and the other creditors of Craft.

Fletcher & Churchman, in their answer, deny all fraud, and aver that on the twenty-seventh of December, 1878, Craft was indebted to them in the sum of \$25,000, for which he gave his two notes, each for \$12,500, payable in 30 and 60 days, and in the further sum of \$7,313, that being the amount paid by them for Craft, at his request, in taking up a note which he had previously given to George F. McGinnis; that the sale by Craft to them was in good faith, and in full payment of his indebtedness; that they realized not more than \$20,000 from the goods; that Craft got no part of the proceeds; that they have no knowledge that any of the goods purchased of either of complainants were in the stock at the time of the transfer; and that the sale to them was in good faith, as preferred creditors, with no intention of cheating, hindering, or delaying the complainants or other creditors.

Craft's answer denies that he received any part of the proceeds; denies all fraud; and avers that the sale was in good faith, in payment of an indebtedness which exceeded the value of the goods and fixtures and the unexpired lease.

Craft's credit seems to have been good with the complainants up to time of his failure, and yet it appears from the evidence that he was insolvent early in 1878. The judgments taken by the complainants were for goods sold after this time, and mostly within a few months before the sale to Fletcher & Churchman. The last purchase from Keller & Untermeier, amounting to \$876, was as late as the twenty-sixth of March, and only 10 days before the transfer. It is probable that these goods were part of the stock sold to Fletcher & Churchman. That they got some of the goods purchased from the complainants, which had not been paid for, is clear enough. Craft swears that in the spring of 1878, and from that time until his final failure, he had the confidence of a sanguine business man that he would be able to keep up and pay all his debts, and I am satisfied that during this period he made payments to the complainants.

Fletcher & Churchman had been accommodating Craft with loans for a number of years. Churchman testifies that Craft always promised if the loans were made, and from any cause he was unable to pay all his debts, he would protect or secure Fletcher & Churchman. The loans made from time to time (on faith of these promises, it is to be presumed) amounted, in August, 1877, to as much as \$20,000. These loans, and others made after that time, were regularly renewed every 90 days, and the interest paid in advance at the rate of 10 per cent. per annum, until the notes were given, which matured on the twenty-seventh of December, 1878. At this time Craft's indebtedness from loans, both he and Churchman say, amounted to \$25,000, for which Craft gave his two notes for \$12,500, payable in 30 and 60 days, instead of 90 days, as in all former renewals. About this time, and perhaps the same day, Fletcher & Churchman paid for Craft the McGinnis note, which was indorsed by Churchman. Instead of taking Craft's note for the amount thus paid for him, Fletcher & Churchman simply held the cancelled note as evidence of its payment by them. Prior to December 27, 1878, Craft had always been required to renew his notes promptly at maturity. The two notes given on this day became due in 30 and 60 days, as already stated, and they were allowed to remain due without renewal until the sale, on the fifth of April. Craft is not able to explain why Fletcher & Churchman required those notes to be made in 30 and 60 days,

instead of 90 days, as in all former renewals, but supposes they had their own reasons for the change. He was not asked to renew these notes when they became due, and he requested no delay. But after thus testifying he says he thinks Fletcher & Churchman were waiting for him to make his annual invoice, on the first of April, before renewing again. Churchman testifies that when these notes were executed, on the twenty-seventh of December, he was anxious to have the indebtedness reduced; that Craft said he would cease buying goods, and he had no doubt he could fix the notes up in 30 or 60 days, or sell enough goods in that time to reduce the amount he was owing; and that when these notes became due he told Craft to let them stand, as they were in the hope that his sales would yet justify him in making some payments. Churchman gives no other reason for the change of time in the renewals, or for allowing them to stand after maturity until the transfer.

Craft completed his invoice on the first of April, which showed that his stock and fixtures amounted to "somewhere in the neighborhood of \$33,000," exclusive of notes and accounts, which were estimated at "about \$1,000." Recognizing that he was in "deep water," he went to the office of his counsel on the fifth of April and directed him to make out papers for an assignment. Just what was done under this direction does not appear; but, instead of making an assignment, Churchman was sent for, and arriving, was told that Craft had finished his inventory, could not pay all his debts, and was undecided as to what he had better do. Churchman then reminded Craft of his repeated promises, when he got the money from time to time, that if he failed and became unable to pay all his debts, he would secure or prefer Fletcher & Churchman. Craft admitted that he had made these promises, and there and then the bill of sale was prepared and executed. Churchman's information was, he says, that Craft was solvent, and he knew nothing to the contrary until he was sent for when the transfer was made. Craft testifies that it was made because Fletcher & Churchman had been his friends, and he felt it to be his duty to prefer them. Both Craft and Churchman testify that the sale was in good faith, in payment of an honest debt, amounting to more than the property was worth. Neither Craft nor Churchman produced the inventory, and in speaking of it, Craft says it amounted to "somewhere in the neighborhood of \$33,000," and Churchman says it amounted to "about \$30,000." It does not appear from the evidence that Churchman saw the invoice before the transfer. It is not stated at what price the goods were invoiced; and although Craft deposited

the proceeds daily with Fletcher & Churchman, and they kept an account with the store, neither witness is definite in speaking of the total or net amounts realized. They both think the net amount was "about \$20,000." Craft is not able even to approximate the proportion of goods sold before the auction sales commenced in August, but thinks that probably half of the stock was thus disposed of; and he is unable to tell what the auction sales amounted to, or at what reduction, if any, on the cost price the goods were sold. There is no evidence as to the value of the lease.

While I have no doubt that Craft was indebted to Fletcher & Churchman, the true amount that was owing does not clearly appear from the pleadings and the evidence. It is true, both Craft and Churchman state that the McGinnis note of \$7,313, with accrued interest from date, and the two \$12,500 notes, and interest after maturity, represented the true amount owing at the time of the transfer. But one of the special interrogatories required the respondents to state the amount of the indebtedness discharged by the sale, and the date and amount of each loan, if any were made, with date and amount of each renewal. In answer to this interrogatory Craft says that at the time of the sale he owed the two \$12,500 notes and the McGinnis note, with the interest due on these notes. Although directly interrogated as to the original loans, their amounts, dates, and renewals, the answer is silent on that subject. Churchman's answer to the same interrogatory, though in different language, is the same as Craft's. These answers were not prepared by the same counsel, and it is somewhat singular, to say the least, that both should be silent on the same point. While testifying before the master, in answer to substantially the same inquiry, Craft says he got \$7,000 November 17, 1876; \$6,000 in February, 1877; \$2,500 August 15, 1877; and \$6,500 October 23, 1877. These loans, amounting to \$22,000, are all that Craft is able to specify; but he says that sometimes he went into the bank and got loans which were not entered, and that he thinks he got \$3,000 at some other time, as the total loans amounted to \$25,000. Craft and Churchman are the only witnesses that testified, and they were called by the complainants.

An insolvent debtor, in the absence of a bankrupt law, has the absolute control of his unencumbered property, and he may prefer one creditor to the exclusion of all others. The favored creditor's debt may or may not be due, and the preference may be by a judgment, a mortgage, a deed, a transfer of securities or choses in action, the sale of personal property, or the payment of money. While the

motive which prompts the debtor thus to favor a single creditor is not material, the transfer, to be valid, must be in good faith and solely in payment of an honest debt. There must be no design to secure an advantage to the debtor over his other creditors, or to delay them in the collection of their debts. It does not follow that because a debtor may prefer such creditor or creditors as he pleases, that he may prefer them on such terms as he pleases. *Grover v. Wakeman*, 11 Wend. 222.

Equity favors an equal distribution of a debtor's property among all his creditors, and it does not view with favor a transaction whereby a single creditor is preferred to the exclusion of all others.

Craft and Churchman are vague and indefinite, when they should be certain and definite. They should state the different loans, specifying dates and amounts, including renewals, which constitute the two \$12,500 notes, the exact amount of the invoice, the amount realized from the goods, both before and after the auction sales commenced, and the gross and net amounts realized from all sales. Craft had been insolvent for a year and a half, and perhaps longer, before the twenty-seventh of December, 1878. Churchman testifies that on the seventh of August, 1877, Craft's loans amounted to \$20,000, after which time he paid the interest, but nothing on the principal. The two \$12,500 notes were the first and only renewals that were permitted to stand after maturity. After these notes were given, on the twenty-seventh of December, 1878, and after they became due, Craft continued to buy goods from the complainants on credit, part of which were in the stock at the time of the transfer.

Without saying that it was in the minds of Fletcher & Churchman and Craft, at the time the last renewals were given, or at any other time, that the latter should get goods east on credit and turn them over to the former in payment of their debt, I think the preference was fraudulent on other grounds. Fletcher & Churchman loaned money to Craft on the faith of his agreement to secure them to the exclusion of all others, if he became insolvent. The complainants, ignorant of these agreements, sold Craft goods on time, trusting to his skill, energy, and integrity. They would not have done this, it is safe to assume, if they had known of the agreements to prefer Fletcher & Churchman at all hazards. These agreements were in the nature of secret liens, which the law will not allow to be enforced against Craft's other creditors. Fletcher & Churchman seem to have been on friendly and confidential relations with Craft, and I have no doubt they knew he was buying goods east on time, after the last

renewals were given as well as before. They assisted him in maintaining a credit to which he was not entitled, and now claim the proceeds of the entire stock against the injured and deluded creditors. If the right of preference may be exercised as the parties exercised it in this case, the law affords ample opportunity for a failing debtor to get the property of one person and use it in paying the debt of another. *Grover v. Wakeman*, *supra*; *Boardman v. Holliday*, 10 Paige, 222; *Riggs v. Murray*, 2 Johns. Ch. 565; *Nicholson v. Leavitt*, 4 Sandf. 252.

A further objection to the sale is that the property was not taken absolutely and unconditionally in payment of Fletcher & Churchman's debt, as a preference. It was a scheme, in part at least, to secure to Craft a personal benefit against his other creditors. Fletcher & Churchman got the lease, and they were to continue the business at the old stand, and, as part of the consideration of the transfer, Craft was to be employed as their agent and superintendent, at a salary of \$150 per month for an indefinite period. During the seven months that he acted as agent he received \$1,050 out of the proceeds of the stock for wages. Why this agreement in advance to employ Craft at a fixed salary, unless he was unwilling to make the preference on any other terms? If he exacted these terms as the condition on which he would make the sale, it was clearly not made for the honest and sole purpose of paying Fletcher & Churchman. It is evident that Craft bargained for and secured a personal benefit or advantage over the complainants while some of the goods which they had sold him on credit were yet on hand as part of the stock, or that Fletcher & Churchman tempted him to make the preference by offering to employ him as stated. If the employment of Craft had been subsequent to the sale instead of before it, and part of the consideration of it, and the preference had been otherwise free from objection, other creditors would have had no right to complain, for they would have sustained no legal injury. If it be admitted—and I do not think it can—that an insolvent debtor may make the best arrangement in his power with his creditors, preferring those who offer the best terms, then all creditors should have a chance to bid for the assets.

It is urged for Fletcher & Churchman (1) that, admitting the sale to them to have been fraudulent in fact, the proceeds have been applied as a preference in payment of an honest debt, and equity will not interfere; and (2) that the sale being at most only constructively fraudulent, they had a right to hold the property as a security for their debt, and therefore they were entitled to the proceeds. The first

of these propositions is unsound, both in law and in morals. One or more creditors of an insolvent debtor are not allowed to take his property by a fraudulent arrangement, convert it into money, and, because the debtor had a right to make an honest preference, defy the other creditors. If a debtor make a voluntary assignment, which is afterwards set aside as fraudulent, the acts of the assignee performed in good faith, in the execution of the trust, will not be disturbed. He will not be held to account for the property or its proceeds which have been paid out by him in good faith to the creditors. This is the law whether the assignment be fraudulent in fact, or only constructively so. *Grover v. Wakeman*, 4 Paige, 23; *Amos v. Blunt*, 5 Paige, 13. And when a sale is not tainted with actual fraud, but is fraudulent merely by construction of law, it is sometimes allowed to stand as a security for the grantee or vendee. *Tripp v. Vincent*, 8 Paige, 176; *Weeden v. Hawes*, 10 Conn. 50; *Bump*, Fraud. Cont. 597. But when a fraudulent scheme or purchase, by which a creditor gets the property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent grantee or vendee, he will not be allowed to share with the plaintiff the proceeds of the property. *Wilson v. Horr*, 15 Iowa, 489; *Riggs v. Murray*, 2 Johns. Ch. 565; *Harris v. Sumner*, 2 Pick. 129.

No general rule can be laid down, applicable to all cases of fraudulent sales, assignments, and preferences. The relief granted in a given case depends largely on the facts of that case. "Equity," say the court in *Clement v. Moore*, 6 Wall. 312; "looks at all the facts, and, giving to each its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in a court of law." The complainants, before bringing this suit, obtained judgments on their claims against Craft, and executions were issued, upon which there were returns of no property. If the property had remained in the hands of the respondent until the bill was filed, the complainants would have acquired a lien on it to the exclusion of other creditors, and they had a right to pursue the proceeds in Fletcher & Churchman's hands with the same result. The aggregate amount of the judgments is less than \$20,000, and Fletcher & Churchman admit that they realized as much from the goods.

I hold, on the facts in the case, that the complainants are entitled to a decree against Fletcher & Churchman for the full amount of their judgments.

Since the court's finding announced for the complainants, other creditors have asked to be made parties to the suit as co-complainants. This may be done, but these creditors will be postponed in favor of complainants. *Weed v. Pierce*, 9 Cow. 722.

BOWMAN *v.* WILSON, Assignee.

(Circuit Court, W. D. Missouri.)

BANKRUPTCY—INTEREST ON CLAIM.

Interest is never allowed where, by order of a court of competent jurisdiction, or by the interposition of the law, or the act of the creditor, payment of the debt has been prevented. It is allowed where the debtor is in default and has the use of claimant's money; but where the fund is in the custody of the law, and cannot be paid out without an order of court, it does not ordinarily bear interest.

Bill of Review.

L. F. Parker, for complainant.

B. B. Kingsbury, for respondent.

MCCRARY, C. J. Interest is allowed upon the ground that the debtor is in default and has the use of claimant's money. It is never allowed where, by the order of a court of competent jurisdiction, or by the interposition of the law, or the act of the creditor, payment of a debt has been prevented. During the continuance of such prevention the interest does not run. If a fund is in the custody of the law—in the possession of a court—and cannot be paid out without the order of such court, it does not ordinarily bear interest. I know of no principle of law or equity upon which the interest claimed can be allowed at the expense of the general unsecured creditors, who are certainly in nowise responsible for the delay in making the final order of distribution. 1 Am. Lead Cases. (3d Ed.) 516 *et seq.*

Demurrer to bill sustained. Decree for respondent.

CONSOLIDATED OIL WELL PACKER Co., (Limited,) v. EATON, COLE & BURNHAM Co.

(Circuit Court, D. Connecticut. July 20, 1882.)

PATENTS FOR INVENTIONS.

Where plaintiff, when suit was commenced, owned the patent, and owned the entire interest in the claim for profits and for damages for past infringements, he may recover for infringements committed before he owned the patent.

George Harding, for plaintiff.

James C. Boyce, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the further infringement of reissued letters patent, dated February 6, 1877, to H. H. Doubleday, assignee by mesne assignments of Owen Redmond; also of reissued letters patent, dated July 3, 1877, to H. H. Bliss, assignee of John R. Cross; also of reissued letters patent, dated July 25, 1876, to H. H. Doubleday, assignee of Francis Martin; also of reissued letters patent, dated November 12, 1878, to Alonzo H. Fowler; the original patent being to said Fowler and Edward J. Morgan, and said Fowler being the assignee of said Morgan. All the patents are for improvements in packing for oil or deep wells. The bill also prays for an accounting of the profits and damages arising from prior infringements. The original patents were issued as follows: The Redmond patent, upon October 30, 1866; the Cross patent, upon February 7, 1865; the Martin patent, upon September 12, 1865; and the Fowler and Morgan patent, upon November 28, 1865.

Oil wells formerly had ordinarily a diameter of about five and one-half inches, and were lined with an iron tube of about two and one-half inches in diameter. The space between the tube and the walls of the well must be closed at some point between the oil-producing rock and the water fissures, else the surface water would prevent the oil from flowing into the well. The common method of shutting off this water was to use a leather bag "of about the same diameter of the bore of the well, and from four to six feet in length. This bag was placed on the outside of the tubing, and located at such point on the tubing as had been previously determined would shut off the surface water, the bag being secured to the tubing by being tied with a string at its lower end. It was then filled with flaxseed and loosely tied to the tubing at its upper end." The tube was lowered into the well,

and in a short time the seed, having become moistened, swelled and packed the space between the wall and tube. Packers of various kinds are now used for the same purpose, and also to prevent the gas from escaping between the tube and the wall of the well.

The defendant, a manufacturing corporation, made, between June 10, 1878, and October 9, 1878, in Bridgeport, in this district, and shipped to a corporation in Bradford, Pennsylvania, to be there used, 17 complete and 165 incomplete packers. The incomplete packers had nearly all the requisite parts, and were purposely made to receive the omitted parts, which were to be supplied in Pennsylvania.

The defendant's packer "consists of a telescopic joint formed of two members, the lower member being a cylinder having as its lower end an internal screw thread adapted to receive a section of casing or tubing commonly called an anchor,—being so called, as I understand it, because the lower end of the anchor rests upon the bottom of the well when the packer is in position; the upper end of the anchor being provided with a flange, on which rests a rubber *annulus* or packing cylinder, which in this Eaton packer is composed of four, five, or more rubber rings encircling the pumping tube; the lower end of the pumping tube sliding within the upper end of the anchor section or member, and provided with a projecting flange, which, when the parts are in position, rests upon the rubber in such manner that the weight of the upper section of tubing presses the upper flange upon the rubber, and thus packs the rubber against the wall of the well, and also against the pumping tube, thereby preventing water or oil from passing between the pumping tube and the wall of the well."

A flange projects from the upper end of the cylinder, which also has an inner shoulder at its upper end. The lower end of the oil tube slides within the upper end of the cylinder, and has an outwardly-projecting flange, which overlaps this inner shoulder of the cylinder. When the tube is removed from the well its shoulder engages the corresponding rim or shoulder upon the packer support, and the packer is also drawn out at the same time. This packer, or the Eaton packer, as it is commonly called, infringes the first and fifth claims of the Redmond reissued patent, if those claims are valid, and are to be literally construed. They are as follows:

"(1) The combination in an oil-well packer of a flexible packing material and a pressing device, arranged outside of the discharging tube, which presses the packing material against the wall of the well, substantially as set forth."

"(5) In combination with the discharging tube of an oil well, flexible packing material pressing against both the tube and the wall of the well, substantially as set forth."

But the description of the Redmond packer contained in the specification of the original patent shows that the invention consisted "primarily in the employment of an adjustable packing device, sliding up and down on the central elevating tube, being operated from the top of the well by wires, rods, chains, cords, or equivalent, and packing both the shaft or bore of the well and the elevating tube, so as to prevent the passage of water downward. The essential advantages attained are that the packing can be raised and lowered to adapt it to any desired position, or can be entirely removed from the well without raising the elevating tube." The patentee also says: "The packing device may be of any construction that will secure the following effects, viz., slide up and down on the central elevating tube so as to be fixed in position at any desired place without removing the tubing, and pack both the shaft and the tube." The Eaton packer was of a very different character. It had no adjustable device for raising or lowering the packer without removing the tubing. The broadest claim of the original was as follows:

"(1) A packing device for artesian wells, packing both the tubing and the sides of the well, when the device is capable either of being adjusted higher or lower upon the tubing, or *vice versa*, the tubing adjusted higher or lower within the packing, substantially as specified."

The first and fifth claims of the reissue, if construed to indicate anything more than the first claim of the original patent, are undue expansions of the original and are void.

The Eaton packer also infringes the first and second claims of the Cross reissue, if those claims are to be literally construed, and are valid. They are—

"(1) In an artesian well packer, a flexible or yielding packing material in combination with devices which press said material against both the wall of the well and the discharging tube.

"(2) In an artesian well packer, the combination with the discharging tube of a flexible or yielding packing material, and two flanges or disks which approach each other and compress the yielding packing material between them."

The specification of the original patent shows that the invention consisted of two flanges surrounding the oil tube. Two screw rods passed through both flanges, the upper flange being fixed in position by means of a collar or other device. The rods revolved freely in

this flange, and were connected with the lower one by a screw thread, which caused it to approach or recede from the upper or stationary flange. The space between the two flanges was filled with fibrous and suitable packing material. The rods extended to the top of the well, and when the point where it was desired to place the packing had been decided upon, were turned so as to draw the flanges together, and thus compress hemp or other packing material against the walls of the well. If it was desired to alter the position of the packing, the rods were turned and the pressure upon the packing thereby released. The patentee also said:

"My packing apparatus is capable of modifications without varying the principle of its construction and operation. For instance, the tube, B, may be made with a slide joint between the flanges, A, A', so that when the lower end of the tube touches the bottom of the well the upper portion will cause the joint to slide together, and thus compress the packing, D, in the same manner that is done in the screw rods, *d, d*. When the tube is raised to withdraw it, it would, of course, loosen the packing by elongating the threads or fibers, D."

Or he says that the tube could be provided with an external and internal screw of sufficient length to effect the adjustment of the packing. The first, at least, of these supposed modifications was not merely a modification of the form of the described device, but involved a new and different method of operation, and when the patent was granted it was limited to a device in which pressure was effected by screw rods or their equivalent, and not by gravity. The first claim of the original patent was for "the arrangement of artesian wells, of a fibrous material, D, consisting of hemp, or other elastic substance, in combination with the rings, A, A', or other suitable frame therefor, so arranged that when said rings approach each other the packing material is compressed laterally, so as to fill the space between the tube and sides of the well, and relaxed when the rings are made to recede; the same being operated from the top of the well by the screw rods, *d, d*, substantially in the manner and for the purpose set forth."

The Eaton packer does not infringe upon the Cross invention as originally patented, for the pressure is effected by gravity and not by screw rods, or their equivalent, and if the first and second claims of the Cross reissue should be construed to include anything more than the first claim of the original, they are void, upon the principles established in the recent decisions of the supreme court, of which *James v. Campbell*, 21 O. G. 337, is an example.

The defendant's packer also infringes the first claim of the Fowler and Morgan reissued patent, provided that claim is valid. It is as follows:

"In a packing for deep wells, the combination with the eduction tube of a pressing device and a hollow cylinder, made of yielding material, encircling said eduction tube, and mounted loosely between the two parts of the device which presses the cylinder against the wall of the well."

In the original patent the patentee said:

"This invention consists in a novel method of packing the tubes of oil and other wells, the packing material being applied to the tube in such a way as to become expanded and contracted by rotating the well tube about its own axis."

The device consisted of a well tube, screw threaded upon the section, which is placed in that part of the well where the packing is to be applied; a nut screwed upon the highest part of the screw thread; a washer or flange fitting loosely upon the tube next below the nut; a nut working in the same screw thread lower down on the tube, and having an upper flange, which forms part thereof; and between the flanges suitable packing, which is capable of becoming expanded by being compressed between the two flanges. The operation of the apparatus was said in the specification to be as follows: When the section which contains the packing cylinder has reached the point where the latter is to be applied, the tube is rotated.

"In the act of rotating the tube, the packing cylinder will be kept stationary by reason of the frictional contact with the sides of the well. * * * This action of the sides of the well on the cylinder, D, will cause the nut, F, to ascend the screw-thread, and thereby compress the packing cylinder, D, between the washers, and so increase its diameter."

It is obvious that the Eaton packer does not infringe upon this invention. The claim was as follows:

"Packing the tube of a well by means of a compressible packing, D, applied between the wall and the tube, said packing being compressible by the adjustment of the nut and washer, or their equivalents, on the threaded tube, substantially as described."

The first claim of the reissue is an unwarrantable enlargement of this claim, and is void.

The remaining patent to be considered is the Martin reissue, the fourth claim of which is as follows:

"In combination with the eduction tube of an artesian well, an elastic flexible packing, a rim or shoulder upon the eduction tube, and a corresponding

rim upon the packer support, whereby, when the eduction tube is removed from the well, the rim or shoulder shall engage with each other and withdraw the packer support, substantially as set forth."

It was conceded by the defendant's counsel, upon the oral argument, that the Eaton packer infringed this claim, and that the invention therein described was also described and shown in the specification of the original Martin patent. The counsel, not insisting upon an invalidity of this claim because it was an expansion of the claims of the original patent and the reissue had been applied for after improper delay, although intimating that such invalidity might properly be the subject of argument, rested this part of the case upon the ground that the fourth claim was for an aggregation of parts and not for a patentable combination.

Although the original Martin patent is printed in the defendant's record—a copy of it is among the papers which were left in my hands—I cannot find that it was offered in evidence. In the index to the defendant's record, although the pages where the other original patents were offered are designated, there is no mention of the place where this patent was offered, indicating that the person who made the index did not find that it was in evidence. As the original patent is not in the case, I am precluded from ascertaining whether the reissue contains new matter.

I am of opinion that each of the elements of the fourth claim co-acts with each of the other elements to produce a result which is the joint product of all the elements. The object of the rims or flanges is to pull the packer from the well when such withdrawal is necessary. Without these rims this could not be successfully accomplished. No anticipation of this claim is shown.

The infringement took place in this district, in the year 1878, while the Martin patent was owned by H. H. Doubleday, who assigned it to the plaintiff on April 4, 1879, and on June 10, 1879, also assigned to the plaintiff all his right, title, and interest in and to any claims for past infringements of said patent within and throughout the state of Connecticut. The two assignments are stated in the bill. The plaintiff, when the suit was commenced, owned the patent, and owned the entire interest in the claim for profits and damages which is here sought to be recovered, and has a right, by virtue of such ownership, to recover in this suit the profits and damages for infringements committed in this district before it owned the patent. *Dibble v. Augur*, 7 Blatchf. C. C. 86; *Henry v. Soapstone Co.* 9 O. G. 408; *Gordon v. Anthony*, 16 Blatchf. C. C. 224.

The regretful delay in the decision of this case was caused by my waiting for the promised brief of the defendant's counsel, which has not yet been furnished.

Let there be a decree for an injunction and an accounting as to the fourth claim of the Martin patent.

ANDREWS and others v. LONG and others.

(Circuit Court, D. Kansas. November, 1880.)

PATENTS FOR INVENTIONS.

The "driven-well" reissue, No. 4,372, for the invention of driving a tube into the earth to form a well, is not infringed by boring into the earth with an auger and inserting a tube without driving or forcing.

In Equity.

Guthrie & Brown, for complainants.

Spilman & Brown, for respondents.

McCRARY, C. J. This cause has been argued and submitted for final determination upon the merits. It is a bill in equity brought to recover damages for an alleged infringement of a patent, reissue No. 4,372, and for an injunction. No question is made by respondents on account of want of novelty, prior discovery and use, or dedication to the public and abandonment, although these several defences are set up in the answer.

The single question presented for determination is whether the respondents have been guilty of an infringement of the patent of complainants.

In order to decide this question it is necessary to give a construction to the patent, and to determine its purpose and scope. The patent is for a new process of constructing artesian wells, and the claim of the patentee is as follows:

"What I claim as my invention, and desire to secure by letters patent, is: The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described."

The claim, however, must be construed in connection with, and in the light of, the specifications which also accompany the patent, and from which I quote as follows:

"My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated.

"The methods of constructing wells, previous to this invention, were what have been known as 'sinking' and 'boring,' in both of which the hole or opening, constituting the well, was produced by taking away a portion of the earth or rock through which it was made.

"This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument, and not removed upwards from the hole, as it is in boring. The instrument to be employed in producing such a well, which, to distinguish it from 'sunk' or 'bored' wells, may be termed a driven well, may be any that is capable of sustaining the blows or pressure necessary to drive it into the earth; but I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw and replace by a tube, made air-tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well-known or suitable form of pump.

"In certain soils the use of a rod, preparatory to the insertion of a tube, is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well, by the act of driving it into the ground to the requisite depth."

The evidence in this case clearly shows that the well constructed and operated by the respondents was made by boring a hole in the ground with an auger, somewhat larger than necessary, for the insertion of the pipe or tube, and by putting the tube down said hole to the water without driving or forcing; and we are therefore to determine whether a well thus constructed is within the terms of the complainants' patent, so as to be an infringement thereof.

It is not contended that Green, the patentee, was the original inventor of the idea of drawing water from the earth by the means of a pump, through a hollow pipe or tube having apertures at the lower end to admit the water.

This process is known to have been in use, and in very common use, long before the granting of complainant's patent. It is very clear that the patentee has made no claim of novelty in any part of his process, except the driving or forcing of the pipe down through the earth to the water-bearing strata, without the necessity of digging or boring, or removing the earth upward.

To use the language of the inventor himself, he claims "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the

earth upward, as it is in boring." One of the necessary features of the invention, and perhaps the principal one, is the "feature of a tight connection between the tube and the earth, effected by the driving of the tube without removing the earth upward, upon the preservation of which the success of the process depends." *Andrews v. Carman*, 3 O. G. 1014.

If the boring be resorted to merely for the purpose of facilitating the driving process,—that is to say, if the hole bored be smaller than the tube to be driven in, so that the tube is, after all, driven or forced into the earth,—so as to form a tight connection between the tube and the earth, the well thus constructed would, in my opinion, be within the terms of complainants' patent; but if a well is sunk by digging or boring, so that the excavation is larger than the tube to be inserted, and nothing is done but to put a tube down into the excavation without driving, and attach a pump, and in this way secure the water, I am clearly of the opinion that such a process is not within the terms of the patent.

I concur in the construction given to this patent by Judge Blatchford, in the case just cited, as follows: "I therefore understand this patent to be a patent for a process, and that the element of novelty in this process consists in *the driving of a tube tightly into the earth without removing the earth upward*, to serve as a well-pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into the well-pit, by the use of artificial power applied to create a vacuum in the manner described."

The same view was evidently taken by Judge Nelson, and concurred in by Dillon, circuit judge, in the case of *Andrews et al. v. Wright*, United States circuit court, district of Minnesota, December Term, 1877.

In that case the learned judge, in discussing the question of want of novelty, referring to certain processes in use before the Green patent, said: "It is evident that the results noted therein are obtained by *boring or excavating, and not by Green's process*. And it is also clear that this process was not used in constructing the salt wells at Syracuse, New York."

I am of the opinion that a well which is constructed by boring or excavating, and where a tube is not forced into the earth by any driving process whatever, is not an infringement of the complainant's patent.

The decree, therefore, must be for the defendants, and it is so ordered. The same order will be made in the case of *William D. Andrews et al. v. Ashfort Stingley and Orville Huntren*, No. 2,766, in which the facts are the same as in the case here considered.

SEARLS v. BOUTON and others.

(Circuit Court, S. D. New York. June 22, 1882.)

PATENTS FOR INVENTIONS—REISSUE—ENLARGEMENT OF CLAIM.

Where the original patent was for a whip-socket having a bell-shaped top, and appears to cover no whip-sockets not having such a shaped top, a reissue for such whip-sockets generally, without any limitation to that form of top, is to that extent enlarged; within the principles of *Miller v. Bridgeport Brass Co.* 21 O. G. 201, and *James v. Campbell*, Id. 337.

In Equity. On Rehearing.

J. P. Fitch, for orator.

N. Davenport, for defendant.

WHEELER, D. J. This cause has now been further heard as to the validity of the reissued patent involved therein, No. 9, 297, dated July 13, 1880, the original of which was dated April 28, 1874, for an improvement in whip-sockets, as affected by the original patent now in evidence. The only question is whether the original will sustain the reissue.

It is argued for the orator that the only form of this question raised by the answer is whether the reissue is for the same invention as that described in the original, and that no question of laches can properly be considered, because no delay is alleged. Without considering whether it is necessary to set that defence up separately in the answer, in order to raise that question, it is sufficient now to notice that in this answer it is alleged that the original patent was not surrendered because it was invalid or inoperative by reason of claiming too much, and that in the reissue the claims have been broadened so as to cover more than the orator had the right to claim as new. This seems to sufficiently put in issue the propriety and lawfulness of the enlargement of the claims, and the scope of the patent at the time, and in the manner in which it was done. The original patent was for a whip-socket having a bell-shaped top, and a rubber disk for steadying the whip, fitting into an inner groove, near the top, in the

bell-shaped part, and appears to cover no whip-sockets not having such a shaped top. The reissue is for such whip-sockets generally, without any limitation to that form of top. The patent is to that extent, and perhaps in some other particulars, enlarged in the reissue. That brings this case within the principles of *Miller v. Bridgeport Brass Co.* 21 O. G. 201, and *James v. Campbell*, Id. 337, as now understood.

Let the decree heretofore ordered be so modified as to dismiss the bill as to this patent.

See *ante*, 625, and note, 626.

WELLING v. LA BAU.

SAME v. GOOTH.

(Circuit Court, S. D. New York. June 15, 1882.)

PATENTS FOR INVENTIONS—PRIOR USE.

Where the defences of prior use and anticipation are not established, injunction for the infringement of the patent will be granted.

WALLACE, C. J. The defences of prior use and anticipation are not well established. In view of the state of the art, the three patents of the complainant in controversy are to be limited to the composition of the specific ingredients in the substantial proportions described. The proofs fail to establish infringement of either patent, except No. 5,940. As to that patent a decree is ordered for an injunction and accounting; the injury upon the accounting to be confined to infringement consisting of the use of shellac and tale in equal parts substantially.

THE POWHATTAN, etc.

(Circuit Court, E. D. New York. July 12, 1882.)

1. SHIPPING—CATTLE—NEGLIGENCE—BURDEN OF PROOF.

On a shipment of cattle in an iron ship in hot weather in July, the burden of proof of negligence on the part of the carrier by not providing sufficient ventilation is on the shipper.

2. SAME—NEGLIGENCE OF SHIPPER.

Where it is not established that there was any negligence anywhere, except such as existed in confining live cattle in the between-decks of an iron vessel in hot weather, and that was the act of the libellant, the libel brought for the loss of cattle by death from heat during the voyage will be dismissed.

3. SAME—CAUSE OF MORTALITY.

The continuance of mortality of cattle after wind-sails are put up and kept up, and the bad condition of the surviving between-deck cattle, was owing to the keeping of the cattle in the between-decks and not to the omission to put up wind-sails at the pier, or to keep the cattle on the pier until the hour of sailing. See 5 FED. REP. 375.

Thomas E. Stillman, for libellant.

Lorenzo Ullio, for claimant.

In this case I find the following facts:

The steamer Powhattan is an ocean steamer built of iron. Her length is 267 feet, and her breadth of beam 32½ feet. Her registered tonnage is 998 tons. She was built in 1878, and was owned by the Mediterranean & New York Steam-ship Company, Limited, and was running between New York and European ports. The firm of Phelps Brothers & Co. were the general agents in New York of the Powhattan and of her owners.

The libellant, in 1878, and for many years prior thereto, was a wholesale butcher and dealer in cattle in Brooklyn, New York. The Powhattan was built for the fruit trade, and was so constructed as to render her between-decks well ventilated for that trade. She had permanent ventilators fixed up to ventilate her hold. She had 15 permanent ventilators, 8 of which were meant to let the hot air up, and the rest had cowls on and were meant to catch the air and force it down; some of them being 15 feet high from the deck and others 9. She had four unusually-large hatches. No. 1, the forward hatch, was 11 feet 10 inches long and 8 feet 9 inches broad. No. 2 was 19 feet 6 inches long and 10 feet broad. No. 3 was 16 feet long and 10 feet broad. No. 4 was 8 feet long and 6 feet broad. The combings of all the hatches were 3 feet 10 inches high, so as to enable the hatches to be kept uncovered in ordinary seas.

On the seventeenth of June, 1878, Moses May, the libellant, and the firm of Phelps Brothers & Co., as agents of the steamer Powhattan, entered into a written agreement at New York, of which the following is a copy:

“NEW YORK, June 17, 1878.

“Engaged from Mr. Moses May, per S. S. Powhattan, hence to Bristol, a full load of cattle in the 'tween-decks and on deck. Rate of freight (\$32.50) thirty-two dollars fifty cents per head for 'tween-decks, and (\$22.50) twenty-

two dollars and fifty cents per head for on deck, payable in gold, without credit or discount, before sailing, with one hundred dollars (\$100) gratuity to the master, payable here. It is understood and agreed that not less than (130) one hundred and thirty head of cattle are to be shipped in 'tween-decks, and (102) one hundred and two on deck. Stalls and fixtures, food, etc., for the cattle to be shipped by shippers. Ship to furnish water and room for feed only. Ship not responsible for loss occasioned by stress of weather or any mortality whatever. Ship agrees to supply intermediate passages for two men back from Bristol to New York. Cattle to be shipped within four days from steamer's arrival at this port. Sailing date on no account to be a Monday. Should steamer be detained over five days, to pay demurrage at (£50) fifty pounds, Br. stg., day by day. S. S. Powhattan reported to have sailed from Bristol on the thirteenth of June for Sandy Hook.

"PHELPS BROTHERS & Co.

"Accepted: MOSES MAY."

At the time the agreement was made the Powhattan was on her way to New York, and Mr. Phelps informed Mr. May that she would sail from New York on or before the first of July. Subsequently the agreement was modified so that only 129 cattle were required to be shipped in the between-decks, instead of 130. Subsequently Mr. May received notice from the agents of the Powhattan to ship the cattle on Sunday morning, July 7th, and was then told that the steamer would sail at 9 o'clock on the morning of that day, in order to enable her to leave at slack water, which on that day was at 9 o'clock in the morning. The steamer could not leave her dock except at slack water. On the evening of Saturday, July 6th, the cattle then being in the libellant's cattle-yard, the libellant divided them into two lots. Into one lot he put the 129 largest of the cattle, leaving 102 cattle in the remaining lot. All the cattle were of the same good quality and condition, but those in the 129 lot were the largest and heaviest cattle. Their average weight was 250 pounds more than the arrangement of the cattle in the other lot.

At 3 o'clock on the morning of Sunday the lot of 129 cattle was taken from the yard, and by 9 o'clock they were properly stalled in the between-decks of the Powhattan. The second lot was properly stalled on the deck of the Powhattan before half past 10 o'clock. When the 129 cattle which were put on the between-decks were taken on board the Powhattan they were in good order and condition for shipment, and were so receipted for by the steamer's agent in the bill of lading. There was a delay of about one hour in taking the cattle on board the Powhattan, owing to the planks not being ready for the cattle to go on board. For the reason the steamer had lost the morning slack tide the master of the Powhattan changed the hour of sailing to 3 o'clock in the afternoon, which was the next slack-water time on that day. The morning was, in its early hours, hazy. There was a light breeze blowing then and throughout the day along the river from the south-west. On the pier there was an iron shed running the whole length of the pier, and its crown was about 20 feet above the deck of the steamer. The Powhattan lay on the north side of the pier, which was then the lee side of the shed. At the signal-service station at New York the recorded observations of the thermometer on the seventh of July were, at 7 A. M., 77 deg.; at 12 M., 80 deg.; at 2 P. M., 82 deg.; at 4:35 P. M., 83 deg.; at 9 P. M., 81 deg.; and at 11 P. M., 79 deg. At Hudnut's, on Broadway, in New York, the recorded observations were, at

3 A. M., 72 deg.; at 6 A. M., 70 deg.; at 9 A. M., 77 deg.; at 12 M., 82 deg.; at 3:30 P. M., 88 deg.; at 6 P. M., 82 deg.; at 9 P. M., 75 deg.; and at 12 midnight, 74 deg. Soon after the cattle were stalled in the between-decks the heat in the between-decks became intense, and the sufferings of the cattle from the heat were great. Application was made to the officers of the steamer to put wind-sails in the hatches; but it is not shown that the use of wind-sails at the pier would have afforded material relief to the cattle in the between-decks. The officers of the steamer did not put up any wind-sails at the pier, saying that they would put them up as soon as the steamer left the dock. The libellant then urged the master of the Powhattan to get under way, and the master promised to start at noon. At 3 o'clock the steamer started. Up to that time the heat and closeness in the between-decks were great, and the cattle suffered much therefrom. While the steamer was lying at the pier, 13 of the permanent ventilators were open and in good working order, 8 of which were intended to draw upwards the heat in the between-decks, and thus allow it to escape.

After the steamer left the dock, and while she was passing down the bay, 12 wind-sails were put up and distributed among the four hatches of the Powhattan, and were kept up during the whole voyage and until the arrival of the steamer in Bristol. The hatches were none of them covered during the voyage, and the ventilators were kept open. The heat in the between-decks continued to be great through Sunday, Monday, Tuesday, and Wednesday. During Sunday night two of the cattle in the between-decks died. On Tuesday morning six more of the cattle in the between-decks were found dead, and on Wednesday morning eight more of them were found dead. During Wednesday two more of them died. Those remaining in the between-decks became greatly emaciated, but no more of them died. On the twenty-first day of July the Powhattan arrived at Avonmouth docks, Bristol, England, and there the surviving cattle were delivered to Samuel Pool & Co., cattle salesmen, to whom they had been consigned by Mr. May for sale on commission for his account. There were 111 of the between-decks cattle still living, but they had wasted away and become sickly, and had depreciated in appearance and value. All the cattle shipped on the deck of the steamer were discharged in good condition with the exception of one, which died from natural causes late in the voyage. The Powhattan was not well adapted to the carriage of live cargo below deck in the month of July. Her hatches were large, but her other permanent arrangements for ventilation were not sufficient for the carriage of cattle below deck in the month of July. The cattle were under the care of two foremen and twelve assistants employed by the libellant. An adequate supply of proper food was sent on board by the libellant, and the cattle were properly fed and cared for by those men. The loss of the 18 between-decks cattle and the deterioration of the rest of the between-decks cattle were due to the heat and insufficient ventilation in the between-decks, but it does not appear that by the use of wind-sails, while the ship lay at the pier with the cattle in the between-decks, the between-decks could have been so better ventilated and the heat so moderated that the cattle there would not have sustained injury; nor does it appear that if the vessel had sailed as soon as the cattle were stalled on board, or if the cattle had been

kept on the pier until just before the time when the vessel in fact sailed, the mortality and depreciation in value which happened would not have happened; nor are any means afforded for determining what mortality or depreciation in value is to be attributed to the heat and deficiency of ventilation which existed in the between-decks between the time the cattle were stalled on board and the time the wind-sails were put up; nor does it appear that any negligence on the part of the master or officers of the Powhattan caused the loss or depreciation in value sued for, or that the same did not result inevitably from the placing and keeping of the cattle in the between-decks of the vessel at that season of the year. Neither during the voyage nor on the delivery of the cattle was any notice given to the officers or crew of the Powhattan that they or the vessel were to be held responsible for the mortality and deterioration and depreciation in value of the cattle.

On the delivery of the cattle at Avonmouth docks the consignees gave them proper care, and in due course offered them for sale, but they sold them without any notice to any person connected with the Powhattan. The market value of the sound deck cattle was affected through their being in the same consignment with the between-decks cattle. Mr. Pool sold the 101 deck cattle and 22 of the between-decks cattle in Bristol, but the remaining 89 of the between-decks cattle, owing to their condition, were unsalable there. Such of the cattle as were unsalable in Bristol were taken to Wakefield, and there Mr. Pool succeeded in selling 45 of them. The remaining 44 he was obliged to take to London to find a market. He sold them there. He necessarily incurred additional expenses in selling the cattle at Wakefield and London, but his entire course in the care of the cattle, and in the times, places, and manner of selling them, was prudent and wise. The cattle were all sold and disposed of before any claim was made on the officers or owners of the Powhattan with a view to render them or the vessel responsible for the loss and depreciation in value of the cattle. The services of a veterinary surgeon were employed by Mr. Pool, in England, in respect to the cattle, but his testimony is not produced. A bill of lading, dated July 8, 1878, was given by the ship for the cattle shipped, wherein, among other printed clauses, there was the following:

"Not responsible for the bursting of bags or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the ship-owner is liable, or otherwise, namely, risk of craft or hulk or transshipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused."

At the foot of the bill of lading were these words in writing: "Not accountable for any damage or mortality from any cause." The 18 between-decks cattle which died would have been worth in the market at Bristol, if delivered in good condition, the sum of £536 15s. 6d. (\$2,603.35) over and above the expenses of sale. The 45 between-decks cattle sold at Wakefield would have been worth in the market at Bristol, if delivered there in good condition, over and above the expenses of sale, £399 7s. (\$1,936.84) more than they were sold

for net. The 44 between-decks cattle sold at London would have been worth in the market at Bristol, if delivered there in good condition, over and above the expenses of sale, £513 6s. 2d. (\$2,489.54) more than they were sold for net. The market value of the 101 deck cattle was affected by the condition of the between-decks cattle to the extent of £1 per head, or £123 (\$489.85.) The 22 between-decks cattle sold at Bristol would have been worth in the market there, if delivered in good condition, £195 16s. (\$949.63) more than they were sold for.

On the foregoing facts I find, as a conclusion of law, that the libel must be dismissed, with costs to the claimant in the district court and in this court.

SAMUEL BLATCHFORD, Circuit Justice.

BLATCHFORD, Justice. On the question as to whether the wind-sails were not put up till Wednesday morning, as contended by the libellant, or were put up on Sunday before reaching Sandy Hook, as contended by the claimants, the district court found in favor of the latter view. As to the omission of the ship to put up wind-sails while she lay at the pier, the district court held that wind-sails would have been of use while the vessel was at the pier; that it was negligence in the ship not to put up wind-sails then; and that the subsequent sickness and death of the cattle in the between-decks were caused by such omission. The argument on the part of the libellant is that the cattle in the between-decks were shipped in good condition, not overheated or exhausted by their transfer from the yards to the ship; that if there were no means of ventilating the between-decks at the pier by wind-sails, the ship should have notified Mr. May that she could not sail till 3 o'clock, so that he might have kept the cattle on the pier; and that the failure to put up the wind-sails was negligence, and all the damages sustained by the libellant can be reasonably attributed to its results. It is further contended for the libellant that such injury was aggravated by the neglect of the ship to put up wind-sails till Wednesday, and that the permanent ventilators of the vessel were insufficient. My conclusions as to these propositions of fact appear in the findings. The burden of proving negligence and of proving that the damage arose from the facts alleged to constitute negligence is on the libellant.

It is not established that there was any negligence anywhere except such as existed in confining live cattle in the between-decks of an iron vessel such as the Powhattan was in hot weather in July. That was the act of the libellant. Negligence in the carrier is not to be presumed from the sickness and death of cattle under such cir-

cumstances. The necessity for putting up wind-sails at the pier must be shown, and that it would have prevented the sickness and death; and that the damage was the direct and proximate result of the omission. This has not been done. The continuance of the mortality through Wednesday, although the wind-sails were put up before reaching Sandy Hook, and kept up, and the bad condition of the surviving between-decks cattle, lead irresistibly to the conclusion that the fatal thing was the keeping the cattle at all in the between-decks of that ship in that weather, and not the omission to put up wind-sails at the pier or to keep the cattle on the pier till the hour of sailing. Certain it is that, with the ship as she was from Sandy Hook on, with wind-sails up and all the appliances she had in use and the hatches open, in view of the causes operating and of the results, no possible discrimination can be made between the damage resulting from the operation of those causes before reaching Sandy Hook and the damage resulting from those causes after reaching Sandy Hook. The evidence is all of it very vague and general. There was not, on the part of any one, any intelligent observation of particular animals as there might have been, so as to show that they sickened or died from the effects of the heat at the pier. All the deaths and all the sickness and all the damage cannot on the evidence be legally attributed to the subjection of the cattle to the heat in the between-decks before reaching Sandy Hook.

The libel must be dismissed, with costs to the claimant in both courts.

See 5 FED. REP. 375.

THE KATE.*

(District Court, E. D. Pennsylvania. June 27, 1882.)

CARRIAGE OF GOODS BY WATER—DUTY OF CONSIGNEE TO REMOVE GOODS FROM WHARF—WHAT IS REASONABLE NOTICE.

A bill of lading stipulated that the consignee should take the goods from the ship immediately she was ready to discharge. The ship arrived at the dock on Saturday, and on the same day, between 11 and 12 o'clock in the forenoon, notice was sent to the consignee that she would discharge on Monday. The cargo was discharged on Monday, and part of it placed on the pier uncovered, although there was a shed on the pier at the end furthest from the vessel.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

About 3 o'clock on Monday it commenced to rain, and the wool was damaged. *Held*, that the notice to the consignee was sufficient, and that as the damage was caused by his failure to remove or protect the goods, the ship was not liable therefor.

Libel by Seville Schofield against the steam-ship Kate to recover damages for injuries to wool shipped on the steam-ship. The facts were as follows:

The wool was shipped at Odessa, consigned to Brown Bros. & Co., at Philadelphia, who afterwards assigned the bill of lading to libellant. The bill of lading contained the following clause: "The goods to be taken from the ship by the consignee immediately the vessel is ready to discharge, any custom of the port to the contrary notwithstanding, or otherwise they will be landed or put into craft by the master or ship's agent at the merchant's risk and expense. The ship's responsibility to cease immediately the goods are discharged from the ship's deck." On Friday, September 10, 1880, the steam-ship arrived at Philadelphia, and the next day was entered at the custom-house and docked. By the regulations of the custom-house a cargo cannot be discharged upon general order until 48 hours after entry, but a special license to discharge earlier may be obtained. Such a license was obtained on behalf of the steam-ship, and on Saturday forenoon, September 11th, between 11 and 12 o'clock, a young man was sent to libellant's office with a written notice that the wool would be discharged on the morning of Monday, September 13th. This notice was not produced by libellant, nor did respondents call the young man as a witness. The libellant, however, testified that he did receive, about 2 o'clock on Saturday, a written notice of the arrival of the ship, and that he could not tell how long the notice had been at his office before he received it. He sent it at once to his custom-house broker to attend to paying the duties, etc. On Monday, between 7 o'clock A. M. and 2 o'clock P. M., the wool was discharged. The pier at the end where the ship was lying was uncovered, but the other end was covered with a shed large enough to protect the whole cargo. Part of the wool was placed in the shed, and part on the uncovered portion of the pier. About 2 o'clock P. M. a bill for the freight was presented to libellant, who paid it under protest. About 3 o'clock P. M. libellant visited the wharf, and found that the wool had all been discharged and was then being weighed by the customs officers. About the same time it commenced to rain. Libellant sent a watchman to the wharf, who partially protected the wool with the steam-ships tarpaulins, but it continued to rain heavily during the night, and the wool on the uncovered portion of the pier was damaged. To recover for such damage libellant commenced this proceeding.

*Alfred Driver, Richard P. White, and J. Warren Coulston, for libellant.
Curtis Tilton and Henry Flanders, for respondent.*

BUTLER, D. J. The contract respecting delivery is special, and very specific. Libellant is required to "take the wool from the ship

immediately she is ready to discharge, any custom of the port to the contrary notwithstanding, otherwise it will be landed or put into craft by the master * * * at the merchant's risk and expense. The ship's responsibility to cease immediately the goods are discharged from her deck."

On the ship's arrival it was the master's duty to give reasonable notice of the time and place of discharge. Whether he performed this duty is the only question involved. If he gave notice on Saturday morning, as respondent alleges, it was reasonable and sufficient. The duty of proving he did is on the respondent; and if the fact is left in doubt a decree should go against him. I think, however, it is not left in doubt. A young man was sent with notice at the time named. No copy was retained nor is the young man produced. It is said he is beyond convenient reach. The answer admits, (impliedly at least,) the receipt of notice on Saturday forenoon. The suggestion that it did not contain a statement of the time and place of delivery is not sustained. The libel, as originally drawn averred the absence of such notice. The libellant, however, was unwilling to affirm this, and the word "sufficient" was inserted by the clerk before qualifying him. This seems like an admission that the notice was specific and particular. Such no doubt was the fact. It is quite plain that the libellant's only objection to it was its insufficiency, as he supposed, in point of time. Depending upon the general custom respecting permits from the customs department, he believed more time would be consumed, after the vessel's arrival, in preparing to deliver the wool than was actually necessary, and that he would thus be afforded more time in preparing to receive it than the notice contemplated. This is made plain by his own testimony. After admitting the receipt of notice on Saturday forenoon, the examination proceeds:

"Question. Will you tell me why you did not "go at once on Saturday, on receiving the notice of which you have spoken, and take charge of it?"

"Answer. Because it is out of custom. Our customary way is when wool comes in that it is put under sheds, and stays there until we have paid our duties, and gone through all the performances; and we don't know but what it is under proper protection until it is handed to us, and we have done with this cargo as with all the rest."

Here is the secret of all the trouble. He had no right to rely upon this custom. Having contracted to take the wool from the ship as soon as she could prepare for delivery, he was bound to do so, regardless of all customs. As before remarked, the notice on Saturday forenoon, of a purpose to deliver on Monday morning, was sufficient.

If he thought otherwise he should, at least, have objected. He, however, gave the subject no attention other than to send the paper to his broker. It was his duty to be present on Monday morning and receive his wool. In his absence the respondent was justified in placing it on the wharf, as he did. He was not required to store it, or place it under cover. Had the libellant been present, in accordance with his duty, it would not be suggested that the place of deposit was improper. Could he by disregard of duty impose on respondent the labor or expense of placing it elsewhere? Certainly not. If loss ensued it was from his own fault. The respondent did not undertake to store the wool, or in anywise protect it after leaving the ship. On the contrary, as we have seen, the libellant contracted to take it when ready for discharge and relieve the respondent from such duty.

The question, however, as before suggested, is one of notice simply, and this having been decided against the libellant, his complaint must be dismissed with costs.

CHRISTIAN v. VAN TASSEL.

(District Court, S. D. New York. June 22, 1882.)

1. WHARVES AND SLIPS—OBLIGATIONS OF OWNERS—WARNING OF OBSTRUCTIONS.

The owner of a slip where canal-boats are in the habit of coming in to discharge their cargoes at the owner's elevator, is bound to keep it free from injurious obstructions at the head of the slip, or to warn vessels thereof.

2. SAME—EFFECT OF NOTICE.

Where the libellant was notified that the water at the head of the slip was shoal, and in order to bring his after hatch beneath the elevator brought the bows of his boat up near to the bulk-head at about high tide, and when the tide fell, a few feet of her bow grounded upon some stones in the bank, of which stones the libellant was not notified, and the bows being high out of the water the boat was strained by the weight of cargo in the center, as the tide fell, causing leakage and damage to the cargo, and no diligence being proved in observing when she first grounded, or any attempt to haul her off immediately thereafter, and it not appearing that when efforts were made to haul her off they would have been successful but for the stones, *held*, that the sloping bank and the boat's grounding thereon at the libellant's risk, after notice, were the primary cause of the damage, aggravated by the stones, which increased the difficulty of removal, for which the defendant was responsible; and both causes concurring, and not being distinguishable, the libellant should recover but half his damages.

Beebe, Wilcox & Hobbs, for libellant.

Butler, Stillman & Hubbard, for respondent.

BROWN, D. J. This is an action to recover damages sustained by the libellant's canal-boat B. F. Wade, and her cargo of grain, on October 29, 1879, through grounding in the slip near the bulk-head, while unloading at the respondent's elevator on pier 39, North river. The respondent owned in fee a strip 15 feet in width along the southerly side of the pier on which the elevator was situated, and 35 feet of the slip adjoining to the southward, up to and including so much of the bulk-head at the head of the slip. His business was to receive and transfer grain from boats coming into the slip for this purpose; and it is not disputed that he had control of at least 35 feet adjoining the pier, nor that he was legally bound to keep so much of it free from injurious obstructions.

On October 28th the libellant's boat came into the slip with some grain consigned to the respondent. That afternoon and the following morning a part was removed from the second and third hatches. It being desired to remove the grain from the fourth or aft hatch, known as the booby-hatch, it was found that there was not sufficient length up to the bulk-head to permit the boat to lie along-side the pier and admit the leg of the elevator into the booby-hatch, so that it was necessary either to wind the boat completely around stern foremost, or else to breast off the bows towards the middle of the slip. On account of the wind and obstructions from other boats, it was found impracticable to turn the boat about, and her bows were therefore shoved off until she could be brought up so as to admit the leg of the elevator.

After the grain was discharged her bows were found to be aground, and they were unable to haul her off until the flood tide, several hours afterwards. While aground by the bows the respondent's superintendent had pulled her stern off from the pier so as to admit another boat under the elevator. He had told the libellant that he would be obliged to interrupt the unloading of the latter's boat before commencing to unload her. The libellant's proofs show that the bows had grounded upon some stones which lay in the mud along the head of the slip. No holes, however, were made in the bottom by these stones, and their only effect would seem to have been to increase the difficulty of pulling her off when she was first noticed to be aground. The strain, however, caused her seams to open so as to make her leak badly, by which the rest of her cargo was damaged. The libellant claims that the respondent is liable for this damage—*First*, because his superintendent at the elevator assumed the direction and control of the boat, and ordered her to the position where

her bows grounded; *second*, for not keeping the slip clear of injurious stones; and, *third*, for moving her stern off where she lay aground at the bows, thereby twisting and injuring her. Notwithstanding the evidence on the libellant's part, I am satisfied that the respondent's superintendent did not assume the responsibility or control of the B. F. Wade in moving her bows round in the slip where she grounded. The libellant, her captain, was aboard, directing her movements, while it does not appear that the superintendent was either aboard or gave any orders on the subject. He testifies that he had previously told the libellant that he had better wind the ship around, because the water at the head of the slip was shoal. Two laborers employed by the respondent assisted in moving the boat. This, it seems, was a common practice, as the boats generally came too short-handed to be moved, as was necessary in the various changes in the slip, without help. This voluntary assistance from the respondent in no degree lessened the responsibility or control of the master of the boat, and the respondent cannot, therefore, be held liable on the first ground claimed.

In regard to the second ground, it is proved by several witnesses that the superintendent said that the ground at the head of the slip was a soft mud bottom. Nothing was said about stones, and the respondent denies that there were any along his 35 feet at the head of the slip. Without going into the details of the testimony, it is sufficient to say that I think the evidence conclusively shows that the bows of the boat did ground upon stones along the port side of the boat, which impeded her removal when she was found to have grounded.

On the part of the respondent, it was contended that the bows of the boat where she grounded were entirely beyond the line of 35 feet from the pier, which was the limit of the respondent's premises. The libel, sworn to less than two months after the injury, stated that the port bow of the boat was breasted off 30 feet from the pier; and it charged that the whole slip was under the respondent's control. The answer admitted that 30 feet were under his control. But upon the trial, the libellant and all of his witnesses who testified on the subject stated that the bows were shoved off only 17 or 18 feet.

There are other points in the proofs, however, which show that the statement of the libel as to the distance of the bows from the pier is very nearly correct. The libellant's son testifies that as she lay fastened to the post on the bulk-head he stepped from the bulk-head upon her bows, and that it was a fair, easy step,—“about two feet.”

This must be considered as referring to the part of the bow nearest to the bulk-head, and not to the stem, which was somewhat further off. The carpenter, who was at work about the bows upon a staging made of two boards, each a foot wide, and fended off by cleats, testifies that she lay far enough from the bulk-head to allow the staging to be "admitted down nicely," and he says the stem was about four feet from the bulk-head. The bows of the boat being square, except the rounded corners, she would, at a distance of five feet from the stem toward the port side, be at least a foot and a half nearer the bulk-head than at the stem itself, which would make that part of the bows two and one-half feet from the bulk-head, and this accords very nearly with the evidence given by the libellant's son. The testimony of these two witnesses, substantially agreeing as to the distance from the bulk-head, enables the distance from the pier to be computed with approximate certainty. For the boat was 96 feet long; the forward line of the booby-hatch, which was 6 feet square, was 10 feet from her stern, leaving 86 feet to her stem; from the leg of the elevator to the bulk-head along the line of the pier was 83 feet 4 inches, and the leg had a lateral play of one foot and a little over each way. The distance between the booby-hatch and the bulk-head being, therefore, 2 feet 8 inches less than the distance to the stem, and the possible play of the elevator being, say 14 inches, the distance along the pier would be 1 foot 6 inches short, and $94\frac{1}{2}$ feet from the bulk-head would measure the point upon the wharf which the stern of the boat must reach, if lying along the pier, in order to admit the elevator leg into the booby-hatch. The boat was therefore swung out at the bows, while her port stern corner turned against the pier, until the elevator leg would go into the booby-hatch, and until her port bow, at its nearest point, came within $2\frac{1}{2}$ feet of the bulk-head, which would make $98\frac{1}{2}$ feet from the stern to the bulk-head along her port side. The effect of swinging her bows out to this distance would be to carry back the forward line of the booby-hatch about one foot further distant from the bulk-head, requiring the boat to be brought forward one foot more for that reason, so that $93\frac{1}{2}$ feet, instead of $94\frac{1}{2}$, must be taken as the base of the right angle along the side of the pier, whose hypotenuse, represented by the port side of the boat prolonged, is $98\frac{1}{2}$ feet; and this, by computation, would give 31 feet as the perpendicular along the bulk-head, and be the distance from the corner of the pier to the point on the bulk-head which the port side of the boat produced would strike. At a distance of 6 feet from the bulk-head, beyond which, on account of the rapid slope of the bottom, no

stones could have affected the boat, the distance of the boat from the pier would have been 2 feet less, or 29 feet, and at 3 feet from the bulk-head she would have been 30 feet distant. As the angle of divergence of the front of the boat from the line of the bulk-head is same as the angle of the side from the line of the pier, it follows that the stem would be $1\frac{1}{2}$ feet further from the bulk-head than a point on her bows 5 feet to port, as above stated; while an equal distance on the starboard side of the stem would be $5\frac{1}{2}$ feet distant from the bulk-head. By thus locating the bows of the boat with, I think, approximate certainty, it can be ascertained on whose premises the injury occurred.

By Mr. Richards, a disinterested witness called by the libellant, who carefully measured the head of the slip not long after the accident, it appears that, at a distance of three feet from the bulk-head, the water, at ordinary low tide, was one foot deep; and that at seven feet from the bulk-head it was three feet deep; and that from that distance the bottom descended very abruptly. It thus appears that even outside of three feet the bottom descended two feet in four. And as the starboard corner of the boat was from five to six feet from the bulk-head, it is clear that most of the impediment in hauling her off must have been upon the port side; and, locating the boat in the position I have assigned her, it will be found that the part of the boat within the limit of 7 feet from the bulk-head, and within the respondent's line of 35 feet from the pier, would be about 30 square feet, while the part to the south of the respondent's line would be about 15 square feet; and, as the latter portion was also in deeper water, there can be little doubt that the chief, if not the entire, part of the grounding was within the respondent's line. This situation is not at variance with the testimony of Capt. Christian, who says the line from the post (which was 42 or 43 feet from the pier) passed over the port bow to the cleat on the deck upon the port side; such a line would fall on the port side of the stem. Two of the witnesses also testify that they saw her bows resting upon the stones along the port side. The testimony of the carpenter that, back of the stones upon which the bow rested, he could see daylight for four or five feet under the boat, seems to me incredible. The captain of the Bottsford says that these stones are flat upon the top, and that for two or three feet back of them she did not touch bottom. Though they were not, therefore, such stones as would make holes in the bottom, they evidently were in the nature of obstructions, making a temporary grounding more likely to do injury, and the removal of the boat,

more difficult. For that reason, I think that the defendant was bound to remove them, or else give notice of them to persons about to move their boats up to the bulk-head.

The respondent's superintendent in this case did not warn the libellant of this danger, as it was his duty to do; and if it were proved clearly that the injury resulted from the stones alone, I think the respondent would be chargeable with the whole damage. But it seems to me impossible to say that the damage proceeded exclusively from the bows catching upon the stones. The stones made no holes, nor themselves caused any direct or immediate injury; their effect was simply to prevent the bows sinking a little deeper in the mud, and to make hauling her off more difficult. The explanation of the damage given at the trial was the straining of the boat from having the bows aground and high out of the water, while the stern was empty and the middle loaded with grain, so that she was bent and strained in the center at the fall of the tide; and this was principally due to the bank on which her bows were allowed to ground. But in addition to this cause, from the angling way in which the boat lay upon the bank and the rapid slope of the bottom under the starboard corner, it is evident that a further strain must have come from the starboard bows, which were heavily loaded, being in deeper water, which would tend to give the boat something of a twist; and this twist would exist whether her port bows were grounded upon rocks or mud; so, also, the weight of the cargo amidships would tend to strain the boat somewhat, though her bows were grounded upon mud only. More or less of this injury must therefore have occurred if no stones were present, unless she had been hauled off when discovered to be aground.

The evidence does not show any diligence on the part of the libellant either to prevent grounding or to keep watch when she would touch, so as to be able to haul her off in time, although he had been previously notified that the water there was shoal. It appears to have been high water at Governor's island on the day in question at 7:34 A. M., so that it must have been slack water, if not ebb tide, at the time the boat was hauled forward, which was after grain was removed that morning from the third hatch. There is no evidence that the captain took any soundings at any time, or any precautions against the falling tide. He does not seem to have noticed that she was aground until his attention was called to it by the captain of the *Bottsford* after the grain was unloaded from the booby-hatch.

There is nothing in the evidence to show, or to authorize me to assume, that if there had been no stones in the mud where she grounded, the efforts which were made to haul her off would have been effectual; and if she could not have been hauled off, more or less of the same damage must have arisen; nor is there anything in the evidence to show that the efforts to remove her were made as soon as she had got aground, or within such a period thereafter that it might be expected they would be able to remove her from the ordinary mud bottom with the means at their command. The libellant, in voluntarily moving the boat forward upon what was known to be shoal water, took the risk of whatever might result from grounding upon the usual mud bottom, and from the angling manner in which she lay upon it; but he did not take the additional risk resulting from the stones, of which he was not apprised and for which the respondent must be held responsible. But, nevertheless, the primary cause of the injury was the sloping bank, which kept the bows high out of water as the tide fell, causing the twist and strain in the center. The stones were not the primary cause of the injury; they merely aggravated the difficulty by making it less easy to haul the boat off when she was found to be aground. The stones, according to the proofs, did undoubtedly contribute substantially in holding her fast when she had grounded. Both causes must, therefore, be held to have concurred in producing the injury, in the absence of any proof that the stones alone prevented the removal of the boat when they first tried to haul her off. As both contributed to the injury, and as they cannot here be separated, I see no way but to divide the damage between the parties, as was done by Judge Sprague in the case of *Snow v. Carruth*, 1 Spr. 324, which will, I think, result in substantial justice to both. A similar rule was applied in this court by my predecessor, Judge Choate, in the case of *The William Murtaugh*, 3 FED. REP. 404, and *The William Cox*, Id. 645, where the loss occurred through the concurrent negligence of both parties, and this was affirmed by *Blatchford, C. J.*, in the circuit court on appeal. 9 FED. REP. 672. See, also, *Connolly v. Ross*, 11 FED. REP. 342.

An order of reference may be taken to ascertain the damages.

THOMMASEN and another v. WHITWILL and others.

(Circuit Court, E. D. New York. 1882.)

1. COLLISION—BETWEEN FOREIGN VESSELS—WHAT LAW GOVERNS.

Where a collision at sea occurred between two vessels of different foreign nations, and no law of either country is proved as a fact, the case must be governed by the provisions of the statute of the United States.

2. SAME—LIMITED LIABILITY OF OWNERS.

The liability of the owners of a colliding vessel for damages caused by a collision is the value of the offending vessel after the collision and at the end of her voyage, with her pending freight.

3. SAME—OFFENDING VESSEL LOST AFTER COLLISION—MEASURE OF LIABILITY.

Where a vessel, after colliding with another vessel at sea, was herself lost in the continuance of her voyage, and was abandoned to underwriters, the liability of her owners is limited to the amount realized by the sale of the wreck by the underwriters.

*Henry T. Wing, C. Van Santvoord, and H. Putnam, for appellants.
Foster & Thomson and R. D. Benedict, for respondents.*

In this case I find the following facts:

The bark *Daphne*, of Arendal, Norway, where she was built, left Baltimore, Maryland, in good condition, on the eighteenth of March, 1876, with a cargo of crude petroleum in barrels, bound to Marseilles, France, and passed out to sea on the twentieth of March. On the twenty-fifth of March, from 20 to 30 minutes after midnight, the *Daphne* was run into by the British steam-ship *Great Western*, bound from Gibraltar to New York with a cargo of merchandise. The place of collision was on the high seas, 175 to 180 miles from Sandy Hook; about 150 miles from the beach near Fire Island light-house, on Long Island. The weather at and before the collision was fine. The night was dark, but there was no difficulty in seeing lights at a great distance on the water. The wind was about E. S. E. The course of the *Daphne* was between N. E. and N. E. $\frac{1}{2}$ N. She was sailing by the wind, on her starboard tack, and had the usual regulation lights—green on her starboard side and red on her port side—properly placed and burning brightly, and was keeping a good lookout. The white mast-head light of the steam-ship was seen from the bark at about 11 o'clock P. M. at a distance off, as estimated, of about 12 miles, and about four points on the bark's starboard and weather bow, and afterwards the steam-ship's red light was seen from the bark. From the time of the first observation by the bark of the white light of the steamer the bark, with all her sails set, except the main-royal and gaff top-sail, was kept on her course N. E. to N. E. $\frac{1}{2}$ N., sailing by the wind, making about six miles an hour, and without any change of her course by the action of her helm until the steamer was coming into her, and was within a distance off of about two of her lengths, and angling a little from aft of the bark towards the bark's bow, as on a port helm, when an order was given to the wheelsman of the bark to keep off, and the bark had fallen off a little when she was struck by the stem of the steam-

ship aft of her fore rigging on her starboard side, the steam-ship cutting into the starboard side of the bark, down from the rail, and into the beam, breaking the water-ways and plank, and doing other damage, which made it necessary for the bark to put back for repairs.

The steam-ship was on a course, before the collision, N. W. by W., crossing that of the bark, and, without sails set, was making between seven and eight knots an hour. The green light of the bark was seen from the steam-ship at a distance off of six or seven miles, bearing W. by S., seven points on her port bow. The steam-ship kept on her course without changing it until she was too close to allow her to go under the bark's stern, and then her helm was ported hard a-port, to bring her around to the starboard and leave the bark on her port hand, in which maneuver she struck the bark aft of her fore rigging, as aforesaid, stem on, after an order was given to stop her engines and reverse full speed, as the bark was falling off.

The libellants sustained damages from the injuries to the bark by the collision, as allowed by the district court, in the sum of \$17,023.44. The value of the steam-ship at the time of the collision, whether ascertained by reference to her condition before the collision, or to her condition after the collision and before her stranding, was from \$140,000 to \$150,000. The libellants are, and were at the time of the filing of the libel herein and of said collision, residents of Arendal, in Norway, and subjects of the kingdom of Norway and Sweden, and there domiciled, and owners of said bark.

The respondent Mark Whitwill was at the same times a resident of Bristol, in England, and a subject of the united kingdom of Great Britain and Ireland, and there domiciled, and one of the owners of the said steam-ship.

After the said collision and on the same twenty-fifth of March, while still on said voyage, and before reaching New York, the said steam-ship was stranded and wrecked on the southern coast of Long Island, from a cause in no way growing out of or connected with said collision, and not directly from any peril at sea, or without the act of man mingling with it, but by the careless navigation and fault of those in charge of her. No freight is shown to have been received on said voyage. The owners of the said steam-ship, on the twenty-eighth and twenty-ninth of March, 1876, duly made an abandonment of the said steam-ship to the various underwriters who had insured her. Before and at the time of said stranding the said steam-ship was under insurance effected by the owners thereof to the amount of £34,000, which they realized from the insurance companies by the payment to them of that sum as for a total loss, after tender of an abandonment. After said abandonment, and on various dates down to the twelfth of May, 1876, the wreck of the said steam-ship and the materials saved therefrom were duly sold at public auction for account of whom it might concern. Such sale was duly and publicly advertised in the city of New York, but no notice of it was otherwise given to the libellants. It was made for the account of the said underwriters, and was pursuant to the directions from the owners, and after paying the expenses of saving and selling the property it realized the sum of \$1,796.14.

On the twenty-seventh of March, 1876, the master of the said bark, acting as agent for the libellants, who were not then in this country, commenced this action in their names. The respondent Whitwill was not in this country.

A process of foreign attachment against the property of the respondents was issued, under which the steamer Cornwall, in which the respondent Whitwill had any interest, was attached, and he appeared generally and answered in the cause. On the trial in the district court, and also on the trial in this court, his answer was ordered to be amended, by adding at the close of the seventh article thereof the words "and he hereby surrenders the same to the libellants." On the trial in the district court, and also on the trial in this court, the counsel for the respondent Whitwill tendered to the other side, in open court, a paper of which the following is a copy, and asked the court to note the fact, and also put in evidence the said paper, subject to objection then made by the libellants, counsel:

"Know all men by these presents, that I, Mark Whitwill, of Bristol, England, heretofore part owner of the steam-ship Great Western, do hereby surrender to Jens Thommasen and Julius Smith, of Arendal, Norway, owners of the bark Daphne, all my interest in the said steam-ship Great Western and her freight, as of the date of March 25, 1876.

"In witness whereof I have hereto set my hand this nineteenth day of April, 1877.

MARK WHITWILL,

"by W. D. MORGAN, Agent.

"In presence of CHAS. F. WELLS.

"City and County of New York—ss.:

"On this nineteenth day of April, 1877, before me personally came William D. Morgan, to me known, and known to be the same person described in and who executed the foregoing instrument as the agent of Mark Whitwill, therein named, and to me known to be such agent, and he to me acknowledged that he executed such instrument as and for the act and deed of the said Mark Whitwill.

CHARLES F. WELLS, Notary Public, New York."

Such paper was executed by the duly-authorized agent of the said Whitwill, and its execution was thereafter ratified by said Whitwill.

On the trial in this court the counsel for the respondent Whitwill offered to produce a paper, to be signed by said Whitwill, by said Morgan, as his attorney, in all respects like the one above set forth, dated April 19, 1877, except containing a transfer to a trustee for the benefit of the libellants, under the provisions of section 42851 of the Revised Statutes of the United States, if the court should be of opinion that such transfer to a trustee, and not a surrender to the libellants, is necessary, and asked that in such event the answer be amended accordingly.

On the foregoing facts I find the following conclusions of law:

(1) The steamer was wholly in fault for the collision, and the bark was not in fault.

(2) The liability of the respondent in this suit is limited to the value of his interest in the steamer in the condition in which she and the remnants of her were after her stranding and wreck, and he is liable in this suit to ——— for such value, which on the present proof is the sum of \$1,796.14, and for nothing more.

SAMUEL BLATCHFORD, Circuit Justice.

BLATCHFORD, Justice. That the steam-ship was wholly in fault in the collision, and responsible for the damages caused to the bark, and that the bark was free from fault, and that the liability of the respondent, unless limited, follows that of the vessel, are propositions entirely clear and not contested.

The respondent contends that he is entitled to the benefit of the limitation of liability provided for by the statutes of the United States. The provisions on the subject in force at the time of this collision are found in sections 4282 to 4285 of the Revised Statutes, which are as follows:

"Sec. 4282. No owner of any vessel shall be liable to answer for, or make good to any person, any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

"Sec. 4283. The liability of the owner of any vessel for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

"Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction to act as such trustee for the person who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner shall cease."

Sections 4282 to 4285 of the Revised Statutes are re-enactments of sections 1, 3, and 4 of the act of March 3, 1851, (9 U. S. St. at Large, 635, 636,) which sections were as follows:

"Section 1. No owner or owners of any ship or vessel shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board any such ship or vessel by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: provided, that nothing in this act contained shall prevent the parties from making such contract as they please extending or limiting the liability of ship-owners.

"Sec. 3. The liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel, and her freight then pending.

"Sec. 4. If any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable among the parties entitled thereto; and it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel or freight for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease."

The case of *Nat. Steam Nav. Co. v. Dyer*, (the case of *The Scotland*,) decided by the supreme court March 20, 1882, 4 Morr. Trans. 277, is authority for the following points:

(1) The act of 1851 applies to owners of foreign as well as domestic vessels, and to cases of collision on the high seas as well as in the waters of the United States, except when the collision occurs between two vessels of the same foreign nation, and it is shown what the law of that nation is, or, perhaps, of two foreign nations having the same maritime laws, and it is shown what that law is.

(2) The maritime law of the United States, as found in the act of 1837, is the same as the maritime law of Europe, and is different from that of Great Britain in this that the former gauges the liability by the value of the guilty

ship and her freight after the loss or injury caused by the collision, and the latter by their value before such loss or injury, not exceeding £15 per ton.

(3) The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country.

(4) The courts of every country will administer justice according to its laws unless a different law be shown to apply; and such rule applies to transactions on the high seas; so that when a collision occurs on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding vessels belong to the same country, or, perhaps, to different countries using the same law. when they will be governed by such foreign law if it be proved.

(5) Ship-owners may avail themselves of the defence of limited liability by answer or plea, as well as by the power of proceeding prescribed by the rules promulgated by the supreme court on the subject; at least, so far as to obtain protection against the libellants in a suit in admiralty to recover for the damages caused by the collision.

(6) If the ship-owners plead the statute in such suit a decree may be made in it requiring them to pay into court the limited amount for which they are liable, and distributing the said amount *pro rata* among the libellants, such proceedings being an "appropriate" proceeding under the statute.

(7) It is not necessary that the owners of the guilty vessel should surrender and transfer her in order to claim the benefit of the statute, but they may plead their unanimity in such suit, and, if found in fault, may abide a decree against them for the value of such vessel and freight, as found by the proofs.

The answer in this case alleges that if the claim of the libellants for damages shall be established against the respondent, the liability of the respondent therefor "is limited to the amount or value of his interest in the said steamer Great Western, and her freight upon the voyage during which such collision occurred, and this respondent's said interest in said steamer and freight is of no value whatever." The answer was sworn to and filed November 25, 1876. The collision occurred March 25, 1876. The answer does not set up that the steamer was stranded or suffered any injury on her voyage after the collision before reaching New York. Still, the allegation in the answer, as to the limitation of the liability of the respondent, must be held to be adequate to allow him the benefit of such limitation of liability as the statutes of the United States afford to him. The allegation that his interest is of no value may be regarded as surplusage, leaving open the question as to what is the amount or value of his interest for which he is to be held liable.

The bark was a Norwegian vessel and the steamer was a British vessel, and no law of either country is proved as a fact. Therefore the case must be governed by the provisions of the statute of the United States.

The respondent contends that his liability cannot exceed the sum of \$1,796.14, as being the value of his interest in the steamer and her freight at the end of her voyage, after her loss by stranding. The question as to the proper rule in a case like the present has not been decided by the supreme court, no such case having been before it.

In *Norwich Co. v. Wright*, 13 Wall. 104, the offending steamer, the City of Norwich, was so injured by the collision that she took fire as a direct consequence of such injury and was so burned that she sank. In that case the supreme court said: "By the maritime law, the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collisions or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage." The court then went on to hold that the act of 1851 covered a limitation of liability in case of injury to another vessel or her cargo by collision. It then proceeded to say that the act of 1851 contained a provision whereby the ship-owner could discharge himself, as in the maritime law, by giving up the vessel and her freight; that such a provision was not found in the statutes of Great Britain, Massachusetts, or Maine, and could not have been inserted without direct reference to the like provision of the maritime codes; and that the act of 1857 intended to adopt the rule of the maritime law on the subject, so far as relates to torts. This was a decision that the owner of the steamer could avail himself of the benefits of the act of 1857 by surrendering the steamer, and any freight that might have accrued, without paying what was the value of the steamer before the collision, and the value of the freight for the voyage.

In the case of *In re The Norwich*, 17 Blatchf. C. C. 221, the owner of the steamer, the City of Norwich, petitioned for a limitation of its liability growing out of said collision. It was found by the court that within half an hour after the collision the boat took fire and was so burned that she sank in about 20 fathoms of water, and that the fire was a direct consequence of the collision, and inseparable from it. The court (Mr. Justice Strong) said:

"The limit of liability prescribed by the act of congress is that it shall in no case exceed the amount or value of the interest of the owner or owners in the offending ship or vessel, and her freight then pending. This presents the question: At what point of time is the value of the owner's interest to be taken? Is the measure of the owner's liability or its maximum the value of

the ship and her freight before the injury was done? or the value at some time subsequent to the injury, when proceedings may be instituted to ascertain its amount? or is it the value immediately after the fault has been committed; as, for example, in a case of collision immediately following the collision caused by it?"

The court then held that by the maritime law all that the sufferers by the misconduct of an offending vessel were entitled to was the vessel itself after the injury had been committed, together with her freight; that that was the measure of the liability adopted by the act of 1851; that the owners of the steam-boat were not liable to the extent of the value of the steam-boat immediately before the collision; and that such was the decision in 13 Wall. 104. The steam-boat had been raised and repaired, and had become of the value of \$70,000, before the petition for a limitation of liability was presented. It was urged that that value must be taken as the measure of the owner's liability. As to this the court said:

"To hold that the owners are liable to the extent of that valuation would be substantially to require them to surrender not only the ship and her freight, but also a sum of money equal to all they expended upon her in raising and repairs. Such, I think, would be a departure from the obvious meaning of the statute, and not required by the maritime law. * * * I cannot doubt that the measure of liability recognized by the maritime law, and by the act of congress, is the value of the offending ship in the condition in which she was immediately after the disaster, adding the freight. Then the claims of the persons injured arose, the claims which the statute limits. The extent of the limitation is not a shifting one, varying with the times when the protection of the act may be sought, any more than it can be enlarged or diminished by the choice of the mode of obtaining that protection. Certain it is that if, immediately after the collision, the steam-boat owners had surrendered the vessel and freight, or transferred them to a trustee, they would have been discharged. Her value and her freight then pending were then all that they were liable for. That was then the extent of their loss. I cannot see that their liability can be increased by anything that may have occurred thereafter. It is the vessel, as she then was, that could have been transferred in satisfaction of all claims, if the owners had elected that mode of obtaining their discharge. And it is the value as it then was, which is the equivalent of the vessel, that might, then, have been paid in pursuance of an apportionment made by the court. Had the vessel proceeded on her voyage after the collision, and had she met with another disaster, occasioned by the fault of the master, by which her value had been greatly reduced, could she then have been surrendered or transferred in full satisfaction of the claims against her, or her owners, arising out of her first fault? Would her value, after the second disaster, have been the measure of the owner's liability? I cannot think such a position can be maintained. Surely, such is not the spirit of the statute. And, if not, it seems equally plain that the

liability of the owner is not enlarged by the fact that, after the collision, the boat has been raised and repaired by them at large expense, or, in other words, has increased in value. * * * The liability of the owner is discharged either by transferring the vessel and freight, or by paying their equivalent; that is, the value of what they might have transferred in discharge, according to the apportionment of the court. The owners have their option of these two modes. They may give up the vessel and freight, or they may retain them and pay their value. But the measure or limit of liability in each case is the same. Very plainly, it is not intended that the creditors shall obtain more when one mode of proceeding is adopted than when the other is followed. But, as I have said, all that the owners are required to transfer is the ship in her damaged condition, as she was immediately after the injury was inflicted. Equivalent to that, is her value at that time."

The court held that the value of the boat immediately after the collision and fire, as she then was, lying at the bottom, which value was \$2,200, together with her pending freight, was the extreme measure of the owner's liability and was the amount to be apportioned. There was \$600 of pending freight, but as it was wholly lost, and not earned, it was held to have been of no value immediately after the collision, and the owner was held not to be liable for it.

In *The Benefactor*, 103 U. S. 239, 246, the court said:

"The counsel for the appellees is mistaken in supposing that the value of the offending vessel at the time of the collision furnishes the only criterion of the amount for which her owners are liable. In *Norwich Co. v. Wright*, 18 Wall. 104, we held that the owners of the offending vessel could, under the statute, discharge themselves from personal liability by surrendering the ship and freight. This would imply that the value of the ship at the time of surrender, with the addition of the pending freight, if the surrender is made in a reasonable time, would furnish a proper criterion of the amount of liability. In the case cited it was also said (p. 124) that 'if the vessel were libeled and either sold or appraised, and her value deposited in court, this sum, together with the amount of the freight, (when proper to be added,) would constitute the *res* or fund for distribution. In England, the value of the vessel immediately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury, even though the ship itself be lost or destroyed at the same time; whereas our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury has occurred, so that if the ship is destroyed the liability is gone; and, whether damaged or not damaged, the owners may surrender her in discharge of their liability. What may be the rule if, after the collision have occurred, the offending vessel should meet with other disasters, greatly impairing her value, is a question which may require further consideration when the case arises. Nothing of the kind is alleged in the present case."

In *Nat. Steam Nav. Co. v. Dyer*, 4 Morr. Trans. 277, the court said:

"In the case of *Norwich Co. v. Wright*, 13 Wall. 116, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. * * * But while this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute. The English statutes, indeed, have not yet adopted to its full extent the maritime law on this subject. They make the owners responsible to the value of the ship and freight at the time of the injury,—that is, immediately before the injury,—although the ship be destroyed or injured by the same act, or afterwards in the same voyage, while our law adopts the maritime rule of graduating the liability by the value of the ship after the injury as she comes back into port and the freight actually earned, and enables the owners to avoid all responsibility by giving up the ship and freight if still in existence, in whatever condition the ship may be, and without such surrender subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster. But while the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. * * * Therefore, while it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. In that case the Scotland, the offending steamer, suffered so severely from the collision that she sank and was totally lost before she completed the voyage she was on at the time of the collision, and only some strippings were saved from her."

The question to be determined in the present case is whether the respondent is freed from the liability he would have been under if the steamer, uninjured by the collision, had safely reached New York, by reason of the fact that she, after such collision, was herself lost during the same voyage from a cause not growing out of such collision.

An examination of section 4283 shows that the limitation of liability is applied to three distinct cases: (1) Loss of property shipped on the vessel; or (2) damage by collision to other vessels and their cargoes; or (3) any other damage or forfeiture done or incurred. Each is independent of the other. The occurrence of any one is sufficient ground for a limitation. The liability exists to the extent not affected by the limitation, and exists because of the happening of the event, the character of which is such that the liability is made to cease when it reaches such extent. The liability in each case comes into existence by the happening of the event, and goes on until it reaches in each case the amount or value of the interest of the owner in the vessel, if that is not greater than the loss or damage. If section 4283 stood alone, it might be said that it intended to give the value of the

interest in each case as it stands immediately after the incurring of the liability, as soon as all direct effect of the event creating the liability upon the physical condition of the vessel has been suffered by the vessel. But no such view can be maintained when the provisions of sections 4284 and 4285 are considered in connection with those of 4283. By section 4284, whenever any loss is suffered by several owners of property on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each, they are to receive compensation from the ship-owner in proportion to their respective losses. The whole value of the vessel and her freight is to be applied to all the losses named in section 4283, though there may be a loss of each of two or of all of said three kinds on the same voyage. Thus there may be the loss or destruction of the property shipped on the vessel, creating at the time a liability, and afterwards on the same voyage she may negligently collide with and damage another vessel, creating thereby another liability. There is, then, under section 4284, a loss suffered by several owners of property on the same voyage. If the value of the vessel and her freight for the voyage is not sufficient to compensate each owner,—that is, all the owners suffering loss,—the ship-owner is with such value to compensate all in proportion to their respective losses. After the happening of the event which caused the loss or destruction of the property shipped, which may have been an explosion or a leakage of liquids, the vessel may have been left of sufficient value to compensate fully for such loss or destruction, but she may have been so damaged by the collision as to make her value as left inadequate to compensate fully for the loss of the property shipped, and also for the damage caused to the other vessel by the collision. In such case the owner of the property shipped cannot claim full compensation. His loss must be put in with the other losses on the voyage, and he must be satisfied with his *pro rata* share of the value of the vessel and freight. The statute is express in section 4284 in including all losses on a voyage. What the losses are cannot be told till the voyage is fully ended. The "whole value of the vessel" mentioned in section 4284 means her value at the close of the voyage. If there be two or more losses during the voyage, for which the ship-owner is liable, and the vessel, after the accruing of the liabilities and during the same voyage, is lost herself, the clear meaning of the statute is that no one shall receive compensation for his whole loss. No different rule can be applied under the statute where the offending vessel is lost after the accruing of one liability, and only one claim for loss is

made by one owner of the property lost. The proceedings for apportionment provided for by section 4284 may be taken where there is but one claim made, and the value of the vessel and her freight is not sufficient to make compensation fully for such claim. This is provided for by rule 54 in admiralty.

These views are supported by the provisions of section 4285, under which the ship-owner may make the required compensation and discharge his liability by transferring his interest in the vessel and freight to a trustee to be appointed by a court. This he cannot do till an opportunity is given to do so. When he does it, the interest to be transferred is the interest as it stands at the time of the transfer, if that is made in a reasonable time, and nothing has intervened amounting to a waiver or forfeiture of the right to make the transfer. These views are in accordance with what has been held to be the general principle of the statute of the United States, namely, an adoption of the maritime law of Europe in respect to a limitation of liability for torts of the master and crew.

It is declared in *Norwich Co. v. Wright* that by the maritime law the ship-owner was discharged by the loss of the vessel on the voyage, or by giving up what was left of her after a disaster to her on the voyage.

Again, in *Nat. Steam Nav. Co. v. Dyer*, the rule of the maritime law is stated to have been only to charge innocent owners to the extent of their interest in the ship for the acts of the master and crew, and to regard their liability as at an end if the ship was lost, and it is there said that our statute adopts such maritime rules. The reservation made in the case of *The Benefactor*, that a question like that in the present case may require further consideration when it arises, must be accepted as only an expression of that proper judicial caution which leaves open in form, questions that are not *sub judice*.

No effect can arise from the fact that the Great Western was stranded by the negligence of her master and crew. The collision with and sinking of the bark were caused by the negligence of the master and crew of the steamer; yet the ship-owner's liability is subject to limitation. If the subsequent loss of the offending vessel destroys his liability, it must do so whether the loss be caused by the negligence of the master and crew, or by a peril of the sea without such negligence. The general principle of the maritime law and of our statute is that the ship-owner exposes to loss, resulting from the faults or neglects of the master and crew to whose care he intrusts his vessel, only the property intrusted to them, and can free himself from

liability for such faults or neglects by surrendering such property in the shape in which it comes back to him from their hands, so long as no privity or knowledge on his part attaches to any such fault or neglect, or to any disaster which has befallen the vessel during the voyage. In accordance with this principle the statute allows an opportunity for such surrender. It could not be made in this case between the time of the collision and the time of the stranding. The risk of the loss of the offending vessel is thrown, for the benefit of commerce, on the owner of the property damaged by her, so that if she is lost in the sea her value shall not again be lost to her owner.

Attention is directed by the libellants to the fact that the cases of *The City of Norwich* and *The Scotland* arose under the act of 1851, while the present case arose under the Revised Statutes, and to certain differences of language between the two enactments. In section 3 of the act of 1851 it is said that the liability of the "owner or owners" shall not exceed the amount or value of the interest of "such owner or owners respectively" in the vessel. In section 4283 of the Revised Statutes it is said that the liability of "the owner" shall not exceed the amount or value of the interest of "such owner" in the vessel. In section 4 of the act of 1851 it is said that "such owner or owners" may transfer "his or their interests." In section 4285 it is said that "such owner" may transfer "his interest." On these differences of language it is contended that the Revised Statutes exclude a limitation of the liability of a part owner to the value of his interest in the vessel and freight, and do not provide any limitation short of the interest of the owner or owners collectively in the whole vessel. There is no force in this contention. By section 1 of the Revised Statutes it is provided that in determining the meaning of the Revised Statutes words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular. It was undoubtedly because of this general provision that the language of the act of 1851 was condensed in the Revision. Read by the light of such general provision, and in view of the principles on which the Revision was made, it must be held that the new language in sections 4283 and 4285 is the result merely of revision, simplification, rearrangement, and consolidation, with a view to the re-enactment of the same substance and meaning. *Murdoch v. City of Memphis*, 20 Wall. 590, 617; *Smith v. Fisk*, 23 Wall. 374; *U. S. v. Clafin*, 14 Blatchf. C. C. 55; *The L. W. Eaton*, 9 Ben. 289, 298-308. The above re-

marks apply also to the suggestion on the part of libellants, that section 4285 differs from section 4 of the act of 1851 in that it limits the operation of an abandonment to a discharge of the ship-owner's liability arising from the particular disaster in respect of which the abandonment is authorized, while under section 4 of the act of 1851 a transfer had the effect to discharge the ship-owner from liability for all torts of the master during the voyage.

It follows from these considerations that the respondent is entitled to have his liability to the libellant limited to the value of his interest in the steamer as such interest existed after she was stranded and wrecked, with the addition of her pending freight. But the respondent contends that under section 4285 the libel must be dismissed because he has made the transfer provided for by making the transfer to the libellants dated April 19, 1877. Under the statute, the transfer, to be effective, must be a transfer of an existing interest in the transferrer, and he must not before have transferred his interest voluntarily to some other person. By the abandonment to the underwriters, and the subsequent sale of the wreck and of the materials saved therefrom for account of the underwriters, and pursuant to directions from the owners before any transfer to the libellants was made, such right of transfer was lost, and the attempted transfer was nugatory. The abandonment to the underwriters transferred to them the property. Whether, under the maritime law, there could or could not have been a surrender after an abandonment to underwriters, it is plain that our statute requires a transfer which will carry title, so that under rule 55 in admiralty the transferee may realize the proceeds for the benefit of the person or persons entitled to damages.

It is contended by the libellants that the transfer which did not include the insurance money could be effective in this case, and that the amount for which the respondent is to be held liable must include such insurance money. On the other hand, the respondent contends that the libellants have no interest in such money.

In *Norwich Co. v. Wright*, 13 Wall. 117, a remark of Pardessus (Droit Comm. part 3, tit. 2, c. 3, § 2) is quoted as follows: "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight, and if they are lost it suffices for his discharge to surrender all claims in respect to the ship and its freight." The court adds, "such as insurance," etc. On the basis of this remark it is recited in *Dyer v. Nat. Steam Nav. Co.* 14 Blatchf.

C. C. 483, 487, as the rule of the maritime law, that if vessel and freight were lost the ship-owner could not discharge himself "without surrendering all claims in respect of vessel and freight, such as insurance," etc. When the case of *The City of Norwich* came before this court on the petition of her owner for a limitation of liability, (17 Blatchf. C. C. 221,) it appeared that at the time of the collision she was insured against fire, not against marine disaster, and that her owner had received from the underwriters, as insurance money, some \$49,000. The question arose whether it should account for that money to the claimants for loss and damage by the collision, in addition to the value of the steam-boat as she lay sunk after the collision and the fire. The court held that under the statute the liability extends only to what would pass to a trustee, and what was required to be transferred as a condition of discharge was only the interest in the vessel and freight; that nothing was said about transferring insurance; that a transfer of property insured does not transfer insurance; and that a policy of insurance is no interest in the thing insured. The court also examined the authorities and concluded that the maritime measure of liability did not extend to insurance upon the vessel, and that there is nothing in our statute to enlarge such measure of liability. I think it is sufficient to rest the question on the plain language of the statute. The "interest" in the vessel which is the measure of the liability under section 4283, and a transfer of which, if made under section 4285, operates to discharge the claim for loss or damage, does not extend to what is not an interest in the vessel. It was easy for the statute to have provided for liability for transfer of claims for insurance. It fails to do so, whether the maritime law did so or not.

The question as to the value of the steamer and her pending freight after her wreck seems, in the evidence, to have been gone into to an extent sufficient to show, on the evidence as it stands, that such net value was only \$1,796.14. But the libellants are at liberty, before a decree is entered on this decision, to apply to this court, on notice, on special cause to be shown by affidavit, for an order of reference to a commissioner to assess such value on the present evidence and on further proofs.

The amount decreed against the respondent by the district court was \$17,023.44 damages, with interest on \$14,371.44 from May 6, 1876, as an average date, to the date of the decree, and \$762.62 costs.

The respondent alone has appealed. He is entitled to his costs in

this court, As he contested the question of fault and negligence, in the district court, by his answer, he is not entitled to costs in that court, but the libellants are entitled to costs in that court.

See 9 Ben. —

McWILLIAMS v. THE VIM, etc.

HALLOWELL v. THE SAME.

(District Court, S. D. New York. June 20, 1882.)

1. COLLISION—OBLIGATION TO HOLD COURSE—RULE 23—LIGHTS.

In navigation in the night-time, and in plenty of sea-room, the obligation upon a vessel to keep her course, under rule 23, (Rev. St. § 4233,) arises from the time when the lights of the other vessel are seen, or ought to be seen, by a proper lookout, within the limits of two miles, prescribed by rule 3, at which distance lights should be visible.

2. SAME.

Where the schooner S., in the westerly part of Long Island sound, sailing in the channel course W. S. W., changed two points to the southward, to S. W., thereby heading nearly directly for a steam-tug, about a mile distant, whose lights were visible, but were not noticed,—the captain being diverted by a discussion with the pilot, who had just boarded her,—and there being plenty of sea-room to have kept his course, *held*, that the S. was within a distance subjecting her to the twenty-third rule, and that she must be held in fault and responsible for the collision which followed.

3. SAME—NEGLECT OF USE OF MEANS TO AVOID COLLISION.

The steam-tug V. having previously shaped her course to pass to the right, and having observed the schooner's change of course when about a mile distant, and having still abundant sea-room and time to pass on either side, *held, also*, responsible for the collision, for not having used promptly the means within her power to avoid it.

4. SAME—WHEN MUST STOP AND BACK.

It being claimed by the tug that the schooner's change of course showed her green light, so that she appeared to be crossing the V.'s course to the star-board side, (the schooner's red light being possibly obscured by her jib,) *held*, that the V. was not justified, under this appearance of the green light only, in continuing her course to starboard, but was bound to go to port, or to stop and back if necessary.

5. SAME—STEAMER TO KEEP OUT OF THE WAY.

A steamer bound to keep out of the way of a sailing-vessel is not relieved from this duty by a previous fault of the latter, but remains bound to use with promptness and diligence all remaining means reasonably within her power to avoid collision, and to make such practicable changes in her own navigation as may be rendered necessary by the faulty changes of the other.

Collision.

On March 5, 1880, as the barge George M. Wright, loaded with coal, was proceeding eastward at the entrance of Long Island sound, between Hart's island and Sand's point, at about half-past 4 in the morning, in tow of the steam-tug Vim, and lashed upon her port side, she was run into by the schooner Spartel, and so injured that she was shortly after beached. These libels were filed by the owners of the barge and of the Spartel to recover their respective damages. The barge being without fault, the controversy was between the Vim and the Spartel as to which of them was responsible for the collision. The night, being overcast, was a good one for seeing lights, and both vessels had all the regulation lights properly set and burning. The tide was flood, and the wind very light from the N. E., nearly directly aft of the course of the Spartel, a small two-masted schooner about 68 feet long, then sailing with her booms on the port side. The channel, as marked upon the chart for vessels coming west past Sand's point, is W. S. W.; from that point the course changes two points and a quarter to the S., namely, to S. W. $\frac{1}{4}$ S., and so continues between four and five miles. On the part of the Vim it was claimed that after seeing the lights upon the Spartel from one to two miles distant, she shaped her course to go to the right, but that shortly before the collision the Spartel changed her course to the southward, when it was too late for the Vim to avoid her; whereupon she reversed her engines, and, as claimed, was making stern-way when the Spartel struck the barge. On the part of the Spartel it was insisted that no change of course on her part was made, except the usual change to keep the channel course at Sand's point, which, as she claimed, was so far from the place of collision as to be no violation of the rule requiring her to keep her course. Each claimed that the other had not a proper lookout.

E. D. McCarthy, for libellants.

Benedict, Taft & Benedict, for the Vim.

Goodrich, Deady & Platt, for the Spartel.

BROWN, D. J. The weight of testimony is that the Spartel made no change in her course except the usual change in the vicinity of Sand's point from W. S. W. to S. W. $\frac{1}{4}$ S. This must be deemed, therefore, to have been the change observed by those on board the Vim, though it must have taken place when the vessels were much further apart than the estimate given by the Vim's witnesses. The Spartel, while upon her course of W. S. W. before reaching Sand's point, would show her red light only to the Vim, which was to the southward, upon a course which must have been very nearly N. E.

by $\frac{1}{2}$ N., the channel course. After the change of the Spartel to S. W. her green light would come into view; and as upon that course she would be headed nearly directly for the Vim, her red light ought also to have been seen by the latter. The Vim's witnesses, however, testify that it was shut out; and it may have been obstructed by the jib, as the sails were on the port side. The Vim had two light-loaded barges upon her starboard side. Her captain testifies that she was making about three knots against the tide; that the Spartel's red light was first seen a mile or two distant, about a couple of points off their port bow, and that the green lights of two other schooners were seen to the southward and astern of her; that she was then going about N. E. by E., and shaped her course to go between the Spartel and the other schooners; that when the Spartel changed so as to show her green light, the Vim blew one whistle, which was repeated when it was observed that she held on her new course, and then blew three whistles as an alarm signal, and then stopped and backed, so as to be making stern-way at the time of the collision. The pilot testifies that they kept porting all the time. The preponderance of evidence is, I think, unquestionably to the effect that the Spartel's change of course was made within such a distance from the Vim as subjects her to the operation of the twenty-third rule, requiring her to keep her course.

There is, perhaps, no definite limit of distance for the application of this rule in all cases. Special circumstances must doubtless modify any general rule in that respect; but where there are no special circumstances affecting the navigation under rule 24, it would seem that the limit of two miles, which is the distance prescribed at which lights must be made visible, ought also by necessary implication to be taken as the distance, if the lights are seen, within which vessels should be required to keep their course, and deviation from it be held to be at their own peril. If that rule is not applied in regard to navigation at night, provided the night is such that the lights could be seen at that distance; or, if not visible at that distance, then from the time when they are visible,—any different rule, which depends upon some less estimated distance of the vessels apart, and its supposed sufficiency to enable the other vessel to keep out of the way, would be attended with such uncertainty and perplexity as to be very embarrassing in practical application, and tend to defeat the very object of the rules enacted to ensure certainty and safety in navigation.

In requiring the colored lights of vessels to be such as may be visible for two miles, it is necessarily assumed that safety in navigation ordinarily requires that the position and courses of vessels should be observable at that distance from each other in order that each may properly shape its course to avoid danger. The twentieth and twenty-third rules, requiring one vessel to keep her course and imposing the whole duty of keeping out of the way upon the other, are established in order to avoid conflicting changes by both. The vessel which is bound to keep out of the way must, therefore, have the right, under this responsibility which is cast upon her by the law, to shape her course as she deems best from the time and within the whole distance at which these colored lights are by law required to be visible for her guidance and governance; and this necessarily implies that the other vessel shall not, within the same limits, make any change of course which might thwart or embarrass the course of the vessel which is legally bound to keep out of the way. If the vessel bound to keep her course might lawfully change it at some indefinite point within these limits after the other's lights have become visible, except for special reasons under rule 24, then the other vessel, though bound to keep out of the way, could not, until that point were passed, shape her own course at all, except at the risk of being thwarted in her efforts to keep clear; and thus hesitation, uncertainty, and conflicting changes in navigation would be continued indefinitely within the limits of two miles, instead of that fixedness and certainty of action being secured which is the evident object of the rules. *The Oregon*, 18 How. 572.

As regards navigation in the night-time, I think, therefore, that vessels must be held subject to the twentieth and twenty-third rules from the time the opposing vessel's colored lights are first seen, or would be discovered by a proper lookout, subject to the qualifications of the twenty-fourth rule. From that time the one vessel has a right to shape her course so as to discharge with certainty and safety the duty of keeping out of the way imposed on her by law, and the other vessel within the same limits is prohibited from change except at her peril; and this view seems to be involved in the decision of Judge Nelson in the case of *The Scotia*, 5 Blatchf. 227. See, also, *The Great Eastern*, 2 Moore, P. C. (N. S.) 31, 44.

The evidence leaves no doubt in this case that the *Spartel* was far within this limit of two miles when her change of course was made. The place of collision, as appears from the great majority of witnesses, was about half a mile west of Sand's point. The master of the

barge, who is a disinterested witness, and the captain and pilot of the Vim, put it at that distance. Schofield, the pilot, who was on board the Spartel, says the collision "was to the west of Sand's point, about half a mile from it." The Spartel was making only from three to four knots with the tide, and the Vim no greater speed. The Spartel's change of course, as Schofield testifies, was made after he came aboard, "and a few minutes after passing Sand's point," from which it would follow that this change was less than half a mile from the point of collision; and as the two vessels were moving at about the same speed, it must have taken place, according to this testimony, when they were less than a mile apart. There was nothing in the situation which required the schooner to change her course at Sand's point. There was abundance of sea-room for nearly a mile to the northward, and she could without difficulty have continued her course of W. S. W., without change, far beyond the point of collision. Had the change not been made she would have passed to the northward of the barge by a considerable margin, and her change of course must therefore be held to have been a violation of rule 28, and a fault which contributed to the collision.

This conclusion would have been reached even if it had appeared that the schooner's change of course had been made deliberately, and in view of the steamer ahead. It is not affected by the circumstance, as clearly appears from the testimony, that the steamer had not been noticed, though plainly within sight at the time. The captain testifies that he acted as lookout, standing by the starboard quarter, with no one forward. Sand's point is the commencement of the pilotage ground coming into New York. The pilot, Schofield, had boarded the Spartel shortly before reaching this point; but a discussion ensued between him and the captain concerning the terms on which he would leave the Spartel and go to one of the other schooners astern, and allow the captain to take the Spartel to New York. The matter had not been settled at the time of the collision, and the pilot testifies that he had not taken charge of the schooner. It seems clear that this debate diverted the attention of the captain, and that little or no attention at that time was paid to other vessels. The captain testifies that when he first saw the Vim he saw both her colored lights directly ahead, three or four minutes after his change of course; so that it is clear this change was made without any reference to the Vim. If he had observed her lights before this change, he would, therefore, have seen her at least two points off his port bow, and at a distance, as I find from the testimony, not vary-

ing greatly from one mile. Had he seen the Vim's lights in that position, it is not to be supposed that, having abundance of sea-room, he would have changed his course so as to steer directly towards her. This change of course, itself a fault under the circumstances, is therefore directly traceable to another fault—the want of a proper lookout. The captain, it is true, estimates the distance of the Vim at “probably a mile or so” when he first saw her lights, and that it was 10 or 15 minutes before the collision. Other testimony of his would indicate that she was then much nearer. He says: “I saw her coming right ahead for us;” and he says that he called the pilot's attention to her and asked if he had not better luff a little; that the pilot said, “Keep your course;” and that “she was then about half a mile away;” while the pilot testified that when the captain thus called his attention to the Vim she was “but a quarter or perhaps not more than an eighth of a mile away, and right ahead, and this was about 10 minutes after the change of course.” It seems clear, therefore, that the Spartel must be held in fault, both for the want of keeping a proper lookout, and for an improper change of course resulting from it, which contributed to the collision. *The Osseo*, 16 Blatchf. 537.

I think it is also clear that the Vim did not, after the Spartel's change of course, perform her whole duty to keep out of the way of the schooner. The schooner's change of course, though a fault, because made when only about a mile distant and after the Vim had shaped her course to go to the southward of her, must, nevertheless, have been perfectly understood by the captain of the Vim, because it was made, as the evidence shows, at the usual place of change, following the channel course. This change, as several witnesses testify, brought the green light in view and shut out the red. Those in charge of the Vim must have known, therefore, that the schooner had either changed to the channel course, with her red light obscured by the jib, or else changed still further to the south, so as properly to shut out the red light. In this uncertainty the Vim was not justified in keeping upon a southerly course to pass to the right. That course apparently tended directly towards a collision, and it so resulted. The weight of the testimony on the Vim's part is much weakened by the very great error in the distance ascribed to the schooner, *i. e.*, an eighth of a mile only, when this change in her course was made. The distance, as I have said, must have been nearly a mile, and the difference is of the greatest importance as respects the duty and responsibility of the Vim. The error in this

respect obliges me to disregard the testimony, which other circumstances make improbable, that at the time the schooner changed her course she was "about two points on the port bow" of the Vim. The necessary situation in passing Sand's point was such, at the time of her change of course, that the Spartel could not have been two points off the Vim's port bow, unless the latter were either previously far to the northward of her usual course, or else were so headed as to run upon Sand's point, only a mile distant, both of which are altogether improbable. When the Vim was first seen from the Spartel, though it may have been only an eighth or a quarter of a mile distant, all their witnesses testify that both the Vim's colored lights were seen, and seen nearly directly ahead. The Spartel, at the time she made the change, must have proceeded very nearly in the channel course, as the narrow channel between Sand's point and Execution rock would not admit of much variation in her position, and her subsequent course was south-west; hence, if both the Vim's lights were visible directly ahead when the schooner was an eighth or a quarter or a half of a mile away, as all her witnesses testify, either the Vim could not have ported much before that time, or, if so, she must previously have been going to the northward of her true course, and the Spartel must, in that case, have been seen on her starboard bow, of which there is no evidence at all. Her captain testifies that his course was about N. E. by E., or a point and a quarter to the southward of the channel course. In that case, if the Spartel passed, as the pilot testifies, on the southerly side of the channel, *i. e.*, nearer to Sand's point, both of the Vim's colored lights might have been seen ahead as described.

From all these circumstances it must be held that the Spartel, at the time of her change of course, when a mile distant, so as to show her green light, must have been nearly directly ahead of the Vim, and that, considering the schooner's slow speed, abundant time and room remained to the Vim to keep out of her way by going upon either side of her. I think it clear that she would, in fact, have done so by putting her helm much less than either hard a-port or hard a-starboard. That her wheel was ported tardily, and but slightly and ineffectively, is evident from the result, as well as accordant with the pilot's manner of testifying in relation to it. And if, as alleged, the Spartel's red light after her change could not be seen, it was the plain duty of the Vim either to starboard her wheel at once and go to port, or to stop until the Spartel, under her green light, had passed to the starboard bow of the Vim, or else to back, if necessary, as required by

rule 21. *The Vicksburg*, 7 Blatchf. 216; *The Northern Indiana*, 3 Blatchf. 92, 108; *The Governor*, 1 Cliff. 93. The case as stated by the captain and pilot of the Vim can scarcely exonerate them in this respect; for, if the Spartel, being two points to port, as they testify, changed her course when only an eighth of a mile distant so as to shut in her red and show her green light, then the danger of collision was obviously so imminent, and the precise course of the Spartel was so uncertain, that it would have been the duty of the Vim to stop and back at once instead of waiting until after two or three signals of the whistle had been given, apparently to induce the schooner to resume her former course. The other testimony, however, will not admit, as above observed, of the correctness of this alleged bearing of the Spartel two points to port at the time she changed her course.

I think the pilot of the Vim is in error in stating that the several whistles were sounded before the Spartel's change of course. No reason appears for any such whistles at that time; the captain puts them after her change, and none were heard on the Spartel till about the distance the captain states of one-eighth of a mile away. Nor can the pilot's testimony be credited that they hauled up on a course of N. E. by E. after passing Stepping Stones, and so kept about three-quarters of an hour. On that course the Vim would have run upon Hewlitt's point or Gangway ledge. In that location it is not possible, except by going zigzag, to deviate much from the regular course of about N. E., and there is no reason to suppose that the Vim followed any other course till after she had passed Gangway ledge half a mile before the collision.

The whole evidence taken together shows, I think, that though the Spartel wrongfully changed her course when within a mile of the Vim, yet the latter, having still abundant time and space to keep out of the way by a further change in her own course, did not take any such prompt or decisive measures to do so as were perfectly within her power; but that she still proceeded nearly upon her former course until the Spartel was near at hand, and then sounded whistles of alarm, and depended, apparently, in part upon the Spartel's luffing up, instead of herself assuming the whole duty of keeping out of the way, as required by law, and changing her own course promptly when this was made necessary by the faulty change of the Spartel. The previous fault of the Spartel did not relieve the Vim from this duty. The safety of life and property requires each vessel, no matter what the previous fault of the other, to use, with prompt-

ness and diligence and in accordance with the rules of navigation, all the means reasonably within her power to avoid collisions. *St. John v. Paine*, 10 How. 557, 584; *The Commerce*, 3 Wm. Rob. 288; *The C. C. Vanderbilt*, Abb. Adm. 361, 364; *The Scotia*, 14 Wall. 170, 181; *The Carroll*, 8 Wall. 302; *The American*, 22 Wm. Rob. 845, 848; *The City of Antwerp*, L. R. 2 Pr. C. 25, 30. In the case last cited Lord Westbury says: "It cannot be too much insisted on that it is the duty of a steamer, where there is risk of a collision, whatever may be the conduct of a sailing-vessel, to do everything in her power that can be done consistently with her own safety in order to avoid collision." The duty of the *Vim* to keep out of the way, so far as lay within her power, still remained, therefore, notwithstanding the *Spartel's* fault in changing her course. Had the *Vim* acted promptly and properly in view of this change, she would have been blameless though accident followed. For not doing so, she must be held responsible as well as the *Spartel*; and decrees should accordingly be entered for the libellant; in the first case, against both; and in the second case against the *Vim* for half the damages, with costs; and a reference to compute the damages.

THE PENNSYLVANIA.

(District Court, E. D. Pennsylvania. June 27, 1882.)

1. ADMIRALTY—COLLISION—FAILURE TO SHOW TORCH—PRESUMPTION OF NEGLIGENCE.

The law requiring a sailing-vessel to exhibit a lighted torch upon the approach of a steam-ship implies that the display of such torch will aid in preventing a collision, and the failure to exhibit such torch must, therefore, be regarded as a contributory fault, in all instances, except only where it is clearly shown that owing to extraordinary facts it could have had no influence upon the result.

2. SAME.

The fact that the side lights of the sailing-vessel were discovered from the steam-ship as early as the torch could have been, will not relieve the sailing-vessel from the charge of negligence in failing to exhibit the torch.

3. SAME—RATE OF SPEED OF STEAM-SHIP.

It is negligence for a steam-ship to run at a speed of from nine to ten knots an hour in a thick fog, through which approaching vessels could not be seen at a distance of over the fourth of a mile.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

4. SAME—GENERAL RULE.

The rule in such cases is that the steam-ship's speed should be such that she can keep off within the distance at which an approaching vessel can be seen.

5. SAME.

A steam-ship and a schooner collided in mid-ocean. The night was thick and foggy, and the steam-ship was making from nine to ten knots an hour. The schooner saw the steam-ship's head-light, but failed to exhibit a torch. The steam-ship saw the schooner's red light and reversed her engines, but could not prevent the collision. *Held*, that both vessels were in fault—the schooner in failing to exhibit a torch, and the steam-ship in running at an unjustifiable rate of speed—and that the damages should be equally divided.

Libel by the owners of the schooner *S. B. Hume* against the steam-ship *Pennsylvania* to recover damages for a loss of the schooner by collision. The facts were as follows: The collision occurred in mid-ocean, at about half past 11 o'clock on the night of July 23, 1878. The weather was thick and foggy. The vessels were bound on opposite courses, the schooner sailing with the wind free about seven knots and sounding her fog horn, and the steam-ship running under steam alone at a speed of from nine to ten knots and blowing her whistle. The master of the schooner had gone below, leaving the starboard watch on deck in charge of the second officer, with instructions that if any object was made out ahead he should "come to on a port wheel." The mast-head light alone of the steam-ship was seen from the schooner, and, in accordance with the captain's instructions, her wheel was at once put hard a-port, causing her to luff into the wind and lose her headway. No torch was shown from the schooner's deck. Those on board the steam-ship first saw the schooner's red light about two points on the starboard bow. The steam-ship's helm was at once ported, and her engines reversed at full speed, but notwithstanding this the vessels came together, the steam-ship striking the schooner two blows,—the first just abaft the main rigging on the port side, and the second a little further forward on the same side, causing her to fill and sink. It was claimed on the part of the steam-ship that at the time of the collision her headway had been entirely overcome, and that she had commenced to back, but that the heavy sea drifted the schooner against her bow, striking her twice before she could back away.

Alfred Driver, J. Warren Coulston, and F. A. Wilcox, for libellants.

Henry R. Edmunds and Morton P. Henry, for respondent.

BUTLER, D. J. The burden of proof is on respondent. Having run the schooner down, the presumptions are against her. She must therefore show that the fault was not hers, or answer in damages. She has undertaken to show it, by evidence that the schooner

alone was blamable,—charging the latter with fault in neglecting proper lookout, alteration of course, failure to exhibit torch, and other less important particulars. That the schooner was blamable in failing to display a torch, as required by statute, is clear. There is nothing in the circumstances shown to excuse this failure. It was her duty to have the light ready, and waiting for such an emergency as arose. She knew that in the foggy atmosphere prevailing, with the direction of the wind and condition of the sea, approaching vessels could only be discovered at short distance, and should have appreciated the importance of being prepared to display this light at any moment. It is fair to conclude that she did not hear the steamer's whistle until her lights appeared, (as the witnesses state,) but at that moment her torch should have been displayed. The argument that her failure to display it did not contribute to the disaster,—(that inasmuch as the side lights of the schooner were discovered as early as the torch could have been, and a display of the latter would not therefore have afforded the respondent additional information, or aid in keeping off, the neglect to display it was unimportant,)—cannot be accepted. The law, as expressed by the statute, implies that the display of such a light will assist approaching steamships in ascertaining the position and course of sail-vessels, and thus aid them in keeping away. The failure to display this light must therefore in all instances be regarded as a contributory fault, at least, where collision occurs under such circumstances, except only where it is clearly shown that owing to extraordinary facts it could have no influence upon the result. Here no such extraordinary facts appear. On the contrary, the circumstances—(the condition of the atmosphere and sea)—rendered the display of a torch in this instance especially important. The schooner's approach being undiscoverable in time for deliberate examination and judgment, it was essential to reasonable chance of escape that the steam-ship should have instant information of the former's exact position and course—such as the torch was calculated to afford.

Whether the schooner was guilty of fault, as charged, in changing her course is, to say the least, open to serious doubt. The vessels were meeting, I think, very nearly head on. Whether the steam-ship was a little off the schooner's port bow, or a little off the starboard, cannot be known with certainty. Neither the statements of witnesses respecting this, the manner of colliding, nor any other circumstance shown, will enable us to ascertain the fact with precision. Exactly how the schooner was heading when her witnesses saw the steam-ship

off her port bow, and when the respondent's witnesses saw her red light, is uncertain, as is also the effect upon the steam-ship's head of reversing her engine under a port helm,—all of which bear upon this question. It would not be safe, therefore, to conclude that the steam-ship was to starboard of the schooner when first seen, and that the latter in changing her course ran across the former's bows. It is possible such was the case. The burden of proof, however, as before observed, is on the respondent; and the fact is not proved. If it were, however, (and no excuse shown—such as impending peril,) the result would not be different. The schooner, as we have already found, was blamable in another respect, and this finding is sufficient to repel the presumption referred to, at the outset. In the absence of contributory fault proved against respondent, it would relieve her as effectually as similar findings on all the charges.

Such contributory fault is, however, proved against her. She was running at an unjustifiable rate of speed—but for which the collision, I believe, would not have occurred, notwithstanding the schooner's fault. She was making nine to ten miles an hour in a thick fog, through which approaching vessels could not be seen over the fourth of a mile. That this is excessive is, I think, clear. Coming unexpectedly upon an approaching vessel, at such a distance, and with such velocity, it would be virtually impossible to avoid disaster. The argument that she stopped before reaching the schooner, and that the latter drifted against her, and was thus injured, finds no just warrant in the evidence. Although ingeniously presented, and earnestly and ably urged, it is clearly unsound. To stop, as suggested, within the distance required was, I believe, impossible. It must be remembered that the schooner had a fair wind, and was also running rapidly. It is quite probable,—I believe clear,—that with a moderate and proper rate of speed the respondent could have kept off. The master testifies that at five or six miles an hour he could certainly have avoided the collision. If unable to see a vessel at greater distance than he saw this his speed should have been so reduced as to enable him to keep off at that distance. Any higher rate was improper. This is the true rule, having the support of sound reason and all well-considered authority: *The Panama*, 5 Sawy. 63; *The Europa*, 1 Prichard, Adm. Dig. 187; *The Blackstone*, 1 Low. 488; *The Colorado*, 1 Brown, Adm. 393; *The Monticello*, 1 Holmes, 7.

This conclusion disposes of the case. It is unnecessary to consider whether the respondent was guilty of other fault. It is clear

that each party was guilty in the respect found and stated, whether guilty in other respects or not is unimportant. The disaster must be attributed to the concurring faults already found.

The libellant will therefore receive a decree for half damages.

The answers of the assessors fully sustain the views expressed, and will be filed herewith.

The court submitted to nautical experts called as assessors certain questions, which, with the answers thereto, were as follows:

(1) Under the circumstances stated by the steam-ship's officers,—the condition of the atmosphere and sea,—was a speed of ten or even nine miles an hour excessive, for the Pennsylvania?

Answer. The steamer's course was W. by N., the wind was S. W., strong, with a heavy head sea, which, for the safety of the men, occasioned the stationing of the lookout at the bridge instead of on the forecastle. The night was dark, and the atmosphere so thick as to require the constant use of the steam-whistle. The steamer was under full-speed bells, making between nine and ten miles per hour when the red light of the schooner S. B. Hume was first seen, about one point on the starboard bow, and about four lengths of the ship distant. Under these circumstances, as stated by the officers of the steamer, the speed of nine or ten miles per hour was excessive, and should have been prudently reduced to a point combining control with safety, which would be half her maximum speed regulated by the bells governing the engine, or about six knots per hour.

(2) Might the display of a torch by the schooner when the steam-ship first came into view have aided to keep her off?

Answer. The schooner's course was E. S. E., single-reefed mainsail, the conditions of the weather as above stated. Had a torch-light been displayed when the mast-head light of the steamer was first sighted, the officers of the latter would have seen the glare of its flash before the red light came into view, and in time to determine the direction of the schooner, thereby aiding the officers of the steamer in averting the collision, either by reversing the engine or by altering her course.

THE WILLIAM COOK.

(District Court, S. D. New York. June 15, 1882.)

1. CHARTER-PARTY—SUPPLIES—LIENS.

Where the charterers of a vessel agree to pay all the expenses of supplying her, and a person furnishing supplies is notified by the owners of the terms of the charter-party and forbidden to credit the vessel, he cannot acquire any lien upon her for supplies afterwards furnished.

2. SAME.

The libellant, having such notice, arranged with the charterer for weekly payments. *Held*, that subsequent supplies must be deemed furnished upon the personal credit of the charterer only.

3. SAME—MASTER—WHEN MAY BIND CHARTERED VESSEL.

It is only in circumstances of distress in a foreign port, or where repairs or supplies are necessary to enable the vessel to complete her voyage or reach the hands of the owners, that the master has an implied authority from the owners to bind the ship contrary to the known terms of a charter-party

Libel in rem for Supplies.

On the sixteenth day of May, 1877, the owners of the steam-boat William Cook, of this city, chartered her to Josiah Pollock from June 2 to October 1, 1877, to be used in the excursion business on the Hudson river, the East river, and Long Island sound; the charterers to have possession, and to pay all expenses of manning and supplying her. Pollock took possession of the boat on the first day of June, and used her only in excursions to Rockaway, obtaining coal from the libellant's yard at Hoboken, New Jersey. The agent of the owners seeing her go to this yard, presumably for coal, went there, and also to the office of the libellant in Hoboken, and gave notice of the terms of the charter, and forbade supplies being furnished upon the credit of the vessel. This notice was conveyed to the president of the company, who afterwards went with his collector to the office of Pollock, in New York, and arranged with him to pay for the coal in weekly payments. Pollock paid for the coal up to the twenty-fifth day of June only. On July 7th possession of the vessel was retaken by the owners, for default in the payment of the hire according to the terms of the charter-party, and this libel was afterwards filed *in rem* to recover for the coal furnished her by the libellant from June 25th to July 7th.

Abbett & Fuller, for libellants.

Benedict, Taft & Benedict and *S. H. Valentine*, for claimants.

BROWN, D. J. The libellant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evi-

dence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libellant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock's personal credit. *Beinecke v. The Secret*, 3 FED. REP. 665; *The Norman*, 6 FED. REP. 406. After such notice it would be a gross violation of justice and equity to permit a material man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had carefully used all possible means of avoiding liability. *The Columbus*, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. *The Monsoon*, 1 Spr. 37; *The City of New York*, 3 Blatchf, 187, 188.

In this case there is nothing in the circumstances to raise any such implied authority to bind the ship; but express notice to the libellant to the contrary. Even as respects necessities it has long been settled that a master's authority in a foreign port to bind the ship or her owners is limited to his instructions, when those instructions are known to the persons furnishing money or supplies. *Pope v. Nickerson*, 3 Story, 465, 477; *The Woodland*, 7 Ben. 110, 119.

The *William Cook*, though she crossed the river at Hoboken, New Jersey, for coal, was in no substantial sense away from her home port. The supplies were not furnished in any condition of distress, or to complete any unfinished voyage, or to bring her home within the reach of her owners; but they were furnished exclusively in reference to her daily excursions from this port to Rockaway, for the sole benefit of her charterer. The coal was not even obtained by the authority or direction of the master, who alone has implied authority in a foreign port to bind the ship for necessary supplies; for he testified that he ordered none of the coal, and had nothing to do with procuring it; all the receipts for coal were signed by the mate only.

Her trips being made from this city, it would seem that the charterer had sent the steamer across the river to Hoboken for no other purpose than to obtain coal and water of the libellants, and that, not for any voyage from that port, but simply preparatory to her trips to be afterwards made from this city to Rockaway.

It may be doubted whether the rule giving a maritime lien in a foreign port for necessary supplies to complete a voyage could be properly applied to supplies thus furnished for such a purpose; but without regard to this point I am clearly of opinion that the supplies in this case cannot be held to have been lawfully furnished upon the credit of the vessel, but only upon the personal credit of the charterer.

The libel should, therefore, be dismissed, with costs.

THE MARSHALL.

(District Court, S. D. New York. June 16, 1882.)

1. TUG AND TOW—RIGHT OF WAY—RIVER NAVIGATION.

A tug with a heavy tow upon a long hawser, coming down the river with the tide, having to pass a sharp bend where the tide sweeps rapidly towards the opposite shore, has the right of way as against a similar tug and tow coming up the stream below the bend. Where the M., with such a tow, came round West Point, on the Hudson river, after signaling the tug C., with a similar tow, below the Point, and receiving similar blasts in return, and kept within 25 or 50 feet of the flats below the Point, and drew as near the Point as was safe, but the end of her tow swung with the tide so as to collide with the tow of the C., *held*, that the M. was not in fault, as she ought neither to have stopped sooner nor to have attempted to cross the C.'s bows to the easterly side of the stream.

2. INJURY TO TOW—NEGLIGENCE—ACTION AGAINST ALL VESSELS IMPLICATED.

Where a barge in tow is injured without her own fault, through the negligence of some one of other vessels, the suit ought to be against all, unless some are clearly not liable, in order that the respective rights of the parties may be determined in a single suit.

Thomas C. Campbell, for libellant.

Benedict, Taft & Benedict, for claimants.

BROWN, D. J. By the statute of this state, steamers navigating the Hudson river are bound to keep upon the right-hand side. The Marshall, in coming down the river with the tide, would have been clearly in the wrong, therefore, in undertaking to go to the left, unless there was clearly no alternative. That no such necessity ex-

isted is evident from the fact that the tows nearly cleared each other, though the Cayuga was in the middle of the river, instead of being upon the easterly side as required by law, which would have enabled the Marshall's tow to pass uninjured. The evidence shows that signals were exchanged half a mile apart for each to pass to the right, and the Marshall had a right to assume that the Cayuga was in the easterly half of the stream, and far enough over to avoid the known necessary swinging of the tow in passing around West Point with the tide.

It is established by a great preponderance of evidence that the Marshall, in coming around the point, went as near the rocks as was safe, and drew her hawser tier very near to the westerly shore, and as near as they were ever known to go, while she hugged the flats upon the westerly side, below the Point, within 25 or 50 feet of their edge.

So far as the Marshall was concerned the collision was caused, it seems to me, solely by the swing of the ebb tide. It was no greater on this occasion, so far as appears, than was usual at that point; and until a collision was seen to be inevitable, it was plainly the duty of the Marshall to keep on hauling as close to the westerly shore as practicable, because this tended to pull the tow out of the swing of the tide and away from the Cayuga's tow below. When it was seen that the collision could not be helped, it was then her duty to stop, in order that the blow might be lightened. In both these respects the Marshall's navigation was correct. In going along within 25 or 50 feet of the flats the Marshall approached them as near as prudent navigation would allow, and I am unable to perceive any fault in her navigation. It was impossible for her to stop before reaching the Cayuga, because her tow upon a hawser 100 fathoms long, and drifting with the tide, would have gone wild and become unmanageable. Had there been any real difficulty in the two tows passing each other off West Point, it was the legal duty of the Cayuga, which was coming against the stream with her tow, to have stopped below until the Marshall and her tow had passed. The Marshall clearly had the right of way, and had a right to assume that the Cayuga would either stop or go far enough to the easterly side of the river to allow the Marshall and her tow to pass. *The Galatea*, 92 U. S. 439; *The Defender*, 1 Bond. 397.

It is urged that the placing of the libellant's boat in the fourth tier instead of the hawser tier was a fault in making up the tow, because, as is claimed, she was deeply loaded, and by her weight in

the rear part of the tow increased the natural swing with the tide to the eastward. I do not find any evidence to show that the collision was caused by the place of the libellant's boat in the tow, or that it would have been avoided had it been placed elsewhere. The difference between the weight of his boat and others, and whether in the first or second tier, or the fifth, is not shown by any evidence to be material in causing the collision; and as the hawser was from 100 to 120 fathoms long, any difference in the swing of the tow from this cause must have been very slight, if any; nor does it appear that the tow was made up in any unusual manner.

As the libellant is himself apparently without fault, I regret that through some misapprehension of the facts all the parties concerned were not joined in this suit, so that the libellant's rights could have been finally adjudicated in one action, and the loss imposed where, upon hearing all the parties, it should seem to belong. But upon the proofs, as they appear in this action, I can find no legal fault in the Marshall, and have no alternative but to dismiss the libel, with costs.

THE ALICE, etc.

(District Court, S. D. Florida. July 14, 1882.)

1. EVIDENCE.

That a party had but one bill of lading and did not deem it prudent to incur the risk of the sea voyage from Antwerp, when it *might* be needed in more important suit, not deemed sufficient to admit in evidence a paper certified by United States consular certificate to be a true copy.

2. CONSULAR CERTIFICATE.

A consular certificate is not evidence.

In Admiralty.

LOCKE, D. J. This is a suit for damages and possession of cargo. The libellant presents by his proctor a paper certified by the United States consul at Antwerp to be a correct copy of an original bill of lading in the possession of Weber, the libellant, and asks that it be accepted as evidence in lieu of the original, upon the grounds that "libellants have but one copy of the original bill of lading, and they deem it best not to expose that to the risk of long sea voyages before they can judge where their principal claim must be enforced." This refers to the fact of a fraudulent shipment and false bills of lading which have appeared in other suits against the same property, and

which have presumably given the libellants (they being consignees of a portion of the cargo and having made large advances thereon) an action against the shipper; and as the amount which can be recovered from this suit is but trifling when compared with that involved, the reason for withholding the original appears plausible; but when more closely examined I am not of the opinion that it offers such an excuse as would justify such a wide departure from the general rule of requiring primary evidence as permitting the introduction of the paper presented would require.

It is much better that private interests and individual cases suffer delay, rather than that the rules of practice and evidence established by the accumulated wisdom of generations in successive decisions should be broken easily down or ignored; and if the libellants have the originals, the production of them can be but a question of time, notwithstanding other interests. The general rule which requires the best evidence, namely, the introduction of the original documents embodying contracts, has, it is true, certain exceptions; but in every case such exception is based upon the inability of the party to procure the original; and this has been so repeatedly affirmed, and so conclusively established, that it can but be recognized as binding. The certificate attached to the copy states, and the libellants acknowledge, that the original is in their possession, and this takes the case from the rule of exceptions. I have been referred to no case, nor have I been able to find one, where the inconvenience of parties or prospect of an original being required in another suit has been considered sufficient reason for the acceptance of a copy in evidence.

International commerce is of too great importance to have the possibility of success of fraud made any greater by breaking down any of the well-established protections for such documents as bills of lading or of exchange; and although there are no suspicious circumstances connected with this case, nor have I personally any doubt of the integrity and validity of the libellant's cause, I do not consider that they have brought themselves within the rule which would authorize the acceptance of secondary evidence. *Greenl. Ev.* § 84, and note; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Sebree v. Dorr*, Id. 558; *Hart v. Yunt*, 1 Watts, 253; *U. S. v. Reyburn*, 6 Pet. 352; *Cornet v. Williams*, 20 Wall. 226; *U. S. v. Laub*, 12 Pet. 1; *Stephen, Ev. arts.* 66, 67.

There is another point which would rule out the copy as authenticated were the one considered insufficient. It has been conclusively decided in the courts of the United States that a consular certificate

cannot be accepted as evidence except where it has been made such by statute, (*Levy v. Burley*, 2 Sumn. 355; *Church v. Hubbard*, 2 Cranch, 187; *U. S. v. Mitchell* 2 Wash. C. C. 188;) and although the acts of August 18, 1856, and of January 8, 1869, have added some force to consular certificates, and given consuls new powers in taking depositions, the law has not been changed in the points in question.

The application to admit the testimony must be denied, but time will be granted to procure the original of the bill of lading, or make a more satisfactory accounting for its absence.

THE D. J. FOLEY.*

(*District Court, E. D. Pennsylvania. June 13, 1882.*)

ADMIRALTY—SERVICE OF TUGS IN BREAKING ICE—AMOUNT OF COMPENSATION.

A tender is evidence that something is due, an acknowledgment of the fact; and where the evidence as to the service is in irreconcilable conflict the court will exercise its discretion as to its value.

Libel by the owners of the tugs *Argonauta* and *Markee* against the steamer *D. J. Foley*, to recover compensation for services rendered.

It appeared that the steamer, while on a voyage from Philadelphia to Honduras, found, after leaving the Delaware breakwater, that her stem had been cut by the ice. She put back to the breakwater, leaking, and was there frozen in and unable to proceed. Her captain telegraphed to the owners that he could reach New York with less difficulty than he could reach Philadelphia, and he was thereupon ordered to New York. Subsequently he telegraphed that he could probably reach Philadelphia, but to this he received no reply. The tugs *Argonauta* and *Markee*, which, subsequently to the arrival of the steamer, arrived at the breakwater, broke a channel for the steamer and assisted in turning her, whereupon she proceeded to New York. The testimony as to the circumstances under which the assistance was rendered was conflicting, the libellants asserting that it was rendered under the belief, induced by the captain of the steamer, that their services were required to tow the steamer to Philadelphia, and respondents alleging that they never made any contract for towage, and that the breaking of the ice by the tugs was not done for the benefit of the steamer, but was the necessary conse-

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

quence of the tugs working their way into the breakwater, whither they were bound for employment. After libellants had made demand for compensation, the respondents offered them \$100 as a "gratuity" for the services, which offer was declined.

Theodore M. Etting and Henry R. Edmunds, for libellants.

Henry G. Ward and Alfred Moore, for respondents.

BUTLER, D. J. It is difficult to reach a satisfactory conclusion in this case. The testimony is in direct, irreconcilable conflict. All that can be determined with certainty is that the libellant did render valuable services to the respondent. The precise situation of respondent, the extent of danger and necessity for aid, and the circumstances under which the libellant afforded assistance, cannot be ascertained. For the services a bill of \$250 was presented, and the respondent tendered \$100. It is not very important that this tender was called a "gratuity." It is evidence that something was due—an acknowledgment of this fact. Considering all the circumstances involved, I think it is safe to say the libellant should receive \$180; and the evidence does not seem to warrant more. A decree will be entered for this sum.

THE J. T. EASTON, etc.

(District Court, E. D. New York. June 26, 1882.)

COLLISION—AT PIER.

Vessel in fault for allowing herself to be placed at a pier, lapping the star-board quarter of another vessel, so as to prevent her from changing her direction as she moved towards the pier, as vessels were being towed out from the pier, and a collision ensued.

Hill, Wing & Shoudy, for libellant.

Owen & Gray, for the James T. Easton.

J. J. Allen, for the Northern Liberty.

BENEDICT, D. J. It was no fault of the libellant's boat to be at the end of pier 7, North river, because she was called there for the purpose of towing a canal-boat, to which she was already made fast when the collision occurred. Neither was it a fault in the libellant's boat that she did not move away from the pier when notified of the approach of the Northern Liberty. Being lawfully where she was, she was not bound to make a place for the Northern Liberty. Besides, upon the evidence, there was not time for her to get away, so as to avoid collision, after danger of collision was apparent.

The Northern Liberty was guilty of fault in allowing herself to be placed lapping the starboard quarter of the Gardner ahead of her on the tow, and fast thereto, so that when the boats were started by the tug towards the pier the Northern Liberty could effect no change in her direction by using her helm as she moved towards the pier. If the Northern Liberty had been in her place behind the Gardner, instead of fast upon the Gardner's starboard quarter, she could have kept herself off from the libellant's boat, as the testimony of the pilot of the Gardner clearly shows.

It was not a fault in the tug to start the two boats towards the piers as she did, for the pilot of the tug had directed the master of the Northern Liberty to get back to his proper position, and had the right to suppose that his order had been obeyed. The master of the Northern Liberty, therefore, is alone responsible for the movement of his boat towards the piers under circumstances which made it impossible for him to sheer his boat off when he found himself approaching dangerously near the libellant's boat.

The testimony of the pilot of the Gardner, that he could have prevented the collision by sheering his boat and so drawing the Northern Liberty off shore as they approached the libellant's boat, does not cast upon the Gardner any responsibility for the collision, for the Gardner was under no obligation to direct the course of the Northern Liberty, and was guilty of no breach of duty by omitting so to do.

The libel against the tug must be dismissed, and a decree entered against the Northern Liberty for the damages and costs.

THE PLYMOUTH ROCK, etc.

(District Court, S. D. New York. June 12, 1882.)

1. TOWAGE SERVICES—PASSENGER STEAMER.

To entitle a libellant to recover salvage compensation for towage services the claimant's vessel must be shown to have been in either actual or apprehended danger at the time the services were rendered.

2. PRACTICE—COSTS.

Where salvage compensation was claimed for towage services, and the answer admitted the claimant's liability for a reasonable towage compensation, the libellant recovered a reasonable sum for towage, without costs, and was adjudged to pay the United States marshal's costs.

In Admiralty.

This was a libel filed by the master and owner of the steam-boat City of Richmond, to recover \$5,000 as salvage compensation for assistance rendered to the steam-boat Plymouth Rock, under the circumstances described in the opinion of the same court, reported in *The Plymouth Rock*, 9 FED. REP. 413, 415, *et seq.*

Lorenzo Ullo, for libellant.

Sidney Chubb, for claimant.

BROWN, D. J. When the aid of the City of Richmond was requested by the captain of the Plymouth Rock, the latter, as I find upon the evidence, was neither in actual nor apprehended danger, being in tow of the Germania, which was fully able to take care of her. The request for aid was merely to expedite her passage and to take off her passengers for their more convenient landing. It is not, therefore, a case of salvage on the part of the City of Richmond.

The libellant is entitled to a reasonable sum for towage and taking passengers. If the parties do not agree, a reference on that point may be taken.

No costs up to this time are allowed, and the libellant should pay the disbursements on the arrest of the vessel. *The Sebastian Bach*, *ante*, 172.

NOTE. This case is a corrected report of the same case, found *ante*, p. 634, which was inserted inadvertently before the return of the corrected proof from the judge who rendered the decision.

Patents for Inventions—Automatic Devices.

BRIDGE v. EXCELSIOR MANUF'G Co., U. S. Sup. Ct. Oct. Term, 1881. Appeal from the circuit court of the United States for the eastern district of Missouri. The decision was rendered by the supreme court of the United States. Mr. Justice *Bradley* delivered the opinion of the court affirming the decree: Cam movements, and others of like character, producing simultaneous operations, according to the needs of the case, such as opening valves on a steam-engine, are in such common use that it requires but little invention to adapt them to a particular case; and, when used for an automatic device, the patentee is only entitled to the precise device which he has described and claimed in his patent.

Robert H. Parkinson, for appellants.

S. S. Boyd, for appellees.